Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)

SOUNDEXCHANGE'S REPLY BRIEF
CONCERNING THE MEANING OF 37 C.F.R. § 384.3(a)

Music Choice spends most of its opening brief arguing against the Section 112(e) statutory license for Business Establishment Services ("BES") and the rates that have been set under that license for more than two decades. This opposition-in-principle is substantively wrong. More to the point, it is irrelevant, as it does nothing to clarify the meaning of 37 C.F.R. § 384.3(a). Section 112(e) is a federal statute, which the Judges do not have authority to second-guess.

To the extent Music Choice addresses the meaning of 37 C.F.R. § 384.3(a), it makes only a perfunctory argument that the text "is perfectly clear." Music Choice's Opening Brief Re: BES Gross Proceeds Referral ("MC Brief") at 24 & 25 n.3. But the District Court has already decided that 37 C.F.R. § 384.3(a) is ambiguous; that issue is settled and is the law of the case. The Judges are not tasked with second-guessing the District Court any more than they are tasked with second-guessing Congress. The Court's referral to the Judges was predicated on its inability to parse the regulatory text without examining its context and its drafters' intent. The Judges have been charged with that interpretive exercise and should complete their assignment.

As explained in SoundExchange's opening brief ("SX Brief"), and as described further below, the "sole purpose" language in the definition of Gross Proceeds cannot mean what Music Choice thinks it means. Music Choice's interpretation is inconsistent with 37 C.F.R. § 384.3(a)(1), which provides for no deductions and instead states that the provider of a BES shall pay a royalty equal to a set percentage "of such Licensee's 'Gross Proceeds' derived from the use in such service of musical programs that are attributable to [copyrighted] recordings." Relatedly, Music Choice's interpretation is at odds with the *Web I* CARP Report and decision of the Register and Librarian, which specifically rejected any deductions from gross proceeds based on the benchmark agreements presented during that proceeding. *Web I* makes clear that the Gross Proceeds definition in 37 C.F.R. § 384.3(a)(2) was merely intended to clarify that Gross Proceeds include in-kind payments, while the basic royalty obligation is the duty in paragraph (a)(1) to pay a percentage of total BES revenue.

Finally, Music Choice's interpretation of 37 C.F.R. § 384.3(a) leads the Judges away from simplicity and transparency, and towards anarchy, which is another good indication that it is wrong. Music Choice suggests not only that the Judges should bless its still-opaque revenue allocation methodology, but that they should advise the District Court that every other BES provider can make up and use any other methodology so long as it is "reasonable." MC Brief at 34-37. This is not an administrable approach to a statutory license—it is a free-for-all. Nothing like this was ever contemplated when the predecessor of 37 C.F.R. § 384.3(a) was adopted.

ARGUMENT

I. Music Choice's arguments against the BES license and BES rate must be rejected.

Music Choice devotes many pages of its opening brief to arguing against the Section 112(e) statutory license and the rates set thereunder, calling the license "strange," "unusual," an

"anomaly," and "the product of a back-room deal," MC Brief at 3, 7, 10, 15, 16, 23, 32, and complaining repeatedly that ephemeral copies lack "independent value," *id*. at 3, 7-8, 10, 16-20, 23, 28, 32. These are not helpful arguments, and they do not provide useful "context." *See id*. at 23 (acknowledgment by Music Choice that the "ultimate question of the appropriate rate for the BES license is not at issue in this limited referral."). The BES license is the law, and the Judges are not free to abandon or undermine it. Further, the statutory royalty rate for BES has always been at least 10%—hardly valueless—because "[w]ithout such ephemerals, no broadcast service could be operated, and no revenue could be generated." Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 (Feb. 20, 2002) ("*Web I* CARP Report") at 118.

A. The BES license is the law and must be enforced by the Judges.

At the risk of stating the obvious, 17 U.S.C. § 112(e) is the law, and the Judges must follow it. *See* 17 U.S.C. § 803(a)(1) ("The Copyright Royalty Judges shall act in accordance with this title"). Because the Judges are not empowered to disregard the judgments Congress made in enacting provisions of the Copyright Act, the aspersions that Music Choice casts on Section 112(e) are simply irrelevant. They should have no bearing whatsoever on the Judges' interpretation of 37 C.F.R. § 384.3(a), which was necessarily designed to *implement* Section 112(e), not *obviate* it.

Music Choice apparently thinks that Congress owed it an explanation for why BES were not subject to "a full exemption" from copyright obligations. *See* MC Brief at 15 (complaining that "there is no explanation anywhere to be found in the legislative history of the DMCA as to why Congress felt it necessary to include the BES in this license"). But Congress does not need to explain itself, to Music Choice or anyone else. "[S]tatutes are records of legislative compromise." *American Ass'n of Retired Persons v. E.E.O.C.,* 823 F.2d 600, 604 (D.C. Cir. 1987); *accord Christian Sci. Reading Room v. City and County of San Francisco*, 807 F.2d 1466, 1471

(9th Cir. 1986); *Hrubec v. Nat'l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995). Sometimes Congress "may rightfully prefer not to articulate" its reasons for compromising certain issues in certain ways. *Christian Sci. Reading Room*, 807 F.2d at 1471; *U.S. v. Morales*, 87-CR-8, 1987 WL 5770, at *2 (E.D. Wis. Jan. 22, 1987) ("Legislative intent is often difficult to decipher since the legislative process is a continuum of competing interests and compromises.").

The fact of legislative compromise does not convert every piece of federal law into a "back-room deal" that parties, courts or administrative bodies can second-guess decades after the fact. To the contrary, it is incumbent on courts to *respect* the outcome of legislative compromises, "for Congress . . . alone is charged with making the close judgments and sometimes messy compromises inherent in the legislative process." *In re BISYS Group Inc. Derivative Action*, 396 F. Supp. 2d 463, 464 (S.D.N.Y. 2005); *see also, e.g.*, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 121 n.8 (D.C. Cir. 2020) ("bargains reflected in statutory text must be enforced as against generalized appeals to statutory purpose"); *Stephan v. Goldinger*, 325 F.3d 874, 877 (7th Cir. 2003) ("A statute is a compromise and must be enforced as such, and thus with due recognition of the various interests that gained recognition in the legislative process"); *Wilderness Socy. v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003) ("[R]egardless of any tradeoffs considered by Congress . . . we interpret and apply the language chosen by Congress, for that language was chosen in order to incorporate and effectuate those tradeoffs."), *amended on reh'g*, 360 F.3d 1374 (9th Cir. 2004).

If a party like Music Choice could come along decades after Congress passed a statute and convince a court (or, here, the Judges) to unwork any law enacted by Congress, it would give interested parties license to "upset[] the legislative balance to push the outcome farther in either direction," *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995), rather than "respect[ing] the

give-and-take of the legislative process and . . . le[aving] the invariable compromises in such laws where the Court finds them." *Michigan Corrections Org. v. Michigan Dept. of Corrections*, 774 F.3d 895, 907 (6th Cir. 2014). At a fundamental level, that would improperly elevate the opinions of an unelected court or administrative body above the will of the people's elected representatives.

That is why "courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Fergeson v. Skrupa*, 372 U.S. 726, 730 (1963). And it is why the Judges here are not entitled to base their interpretation of 37 C.F.R. § 384.3(a) on Music Choice's opinion that 17 U.S.C. § 112(e) is "strange," "unusual," or an "anomaly," whether the Judges themselves think 17 U.S.C. § 112(e) is wise or unwise. *See Olsen v. Nebraska ex rel. Western Reference & Bond Assn.*, 313 U.S. 236, 246 (1941) (courts should not be concerned with "with the wisdom, need, or appropriateness" of legislation enacted by Congress).

If it mattered (and it does not), Music Choice's suggestion that the Section 112(e) license for BES was a secret deal sprung on BES providers with no explanation is also factually wrong. As Music Choice acknowledges, BES providers were established businesses participating fully in the legislative processes relating to music in the 1990s. MC Brief at 10. As Congress neared the completion of its work on the Digital Millennium Copyright Act ("DMCA"), there were disputes across industries concerning the relationship between the ephemeral recordings exemption in Section 112(a) and the then-new digital performance right. Unlike earlier *analog* services, BES providers making *digital* transmissions did not satisfy the then-existing eligibility conditions for the ephemeral recordings exemption. *See* Pub. L. No. 94-533, 90 Stat. 2541, 2558 (1976) (a license or transfer of the copyright or transmission under Section 114(a)). *Contra* MC Brief at 11, 14.

To address these disputes, Congress determined that it needed to address "the application of the ephemeral recording exemption in the digital age." H.R. Conf. Rep. No. 105-796 at 78

(1998). Specifically, Congress chose to extend the ephemeral recordings exemption in Section 112(a) *only* to copies made by terrestrial broadcasters to enable their digital broadcasts. *Id*. Without question, other organizations making digital transmissions—like BES providers—would have loved that same treatment. But that was not the deal they got. Instead, Congress decided that such services should receive the benefit of the new Section 112(e) license, which would both "ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used" and "create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services." *Id*. at 79-80.

Importantly, Congress explained that the Section 112(e) license was "intended *primarily* for the benefit of" BES providers. *Id*. at 89 (emphasis added). And a benefit it was. BES providers would not need to bargain with individual copyright owners to acquire reproduction rights for their digital broadcast services, as they always had for their on-premises services. Rather, they would have the convenience that comes from being able to operate under a statutory license.

In short, Congress *could have* treated BES like terrestrial radio when it enacted Section 112(e) in 1998—as it did when creating a performance right exemption in the 1995 Digital Performance Right in Sound Recordings Act. MC Brief at 8-10, 23, 32. But Congress didn't. And that legislative determination—rather than Music Choice's wishes about what could have or should have happened instead—is what the Judges are obligated to respect and enforce.

B. Music Choice misrepresents the Copyright Office's 20-year old policy preferences concerning ephemeral licensing for webcasting, which in any event are irrelevant.

Music Choice's arguments against Section 112(e) rely heavily on a brief discussion (and particularly one footnote) in the Copyright Office's Report Pursuant to Section 104 of the DMCA.

MC Brief at 14-18; *see also id*. at 2-3, 7, 11, 12, 23, 28, 29, 32; U.S. Copyright Office, DMCA Section 104 Report: A Report of the Register of Copyrights Pursuant to § 104 of the DMCA, at 142-46 & n.434 (2001) ("Section 104 Report"). Music Choice does not describe the report accurately. The report is also irrelevant, because it contains an outdated policy opinion that has no bearing on what the law is, as the Register herself explained in *Web I* when rejecting the same arguments Music Choice makes now.

Section 104 of the DMCA required the Register to report to Congress on the DMCA's effect on the operation of Section 109 of the Copyright Act (the first sale doctrine) and Section 117 of the Copyright Act (use of computer programs). Pub. L. No. 105-304, § 104, 112 Stat. 2860, 2876 (1998). Notwithstanding that limited mandate, the Register also chose to opine on several additional topics, including broader issues concerning the legal status of temporary copies. *See* Section 104 Report at 106-07. As part of that discussion, the Register made three main policy recommendations. To the extent that any of them was directly relevant to BES, it was the first, a recommendation "*against* the adoption of a general exception from the reproduction right to render noninfringing all temporary copies that are incidental to lawful uses." Section 104 Report at 141 (emphasis added).

Of course, Music Choice doesn't like that recommendation, so it relies instead on quotations taken out of context from the discussion of a second recommendation, which was not directly relevant to BES, "that Congress enact legislation . . . to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to *temporary buffer copies* that are incidental to a *licensed* digital transmission of a public performance of a sound recording and

any underlying musical work." *Id*. at 142-43 (emphasis added).[1] Music Choice tries to weaponize this twenty-year old nonbinding recommendation in service of a victory here. Its attempt fails for several reasons.

First, contrary to Music Choice's suggestion, MC Brief at 23, 27-29, the policy opinion expressed by the Register in the Section 104 Report does not explain her use of the word "sole" in the *Web I* definition of Gross Proceeds in 2002. As such, it has no bearing on the issue that was referred to the Judges by the District Court.

Second, and obviously, the Register's recommendation was not a statement of law; it was instead a recommendation "that Congress enact legislation." Congress never took up the Register's invitation. The Judges are bound to apply the Copyright Act, not the Register's suggested but never-implemented modifications thereto.[2]

Third, Music Choice's favored passage from the Section 104 Report failed to gain traction with the Judges' predecessors. The Section 104 Report issued while *Web I* was pending. Not

[1] The third recommendation was that "public performances incidental to licensed music downloads should result in no liability." Section 104 Report at 146.

[2] As Music Choice notes, MC Brief at 11, 18, the Register passingly suggested that reproduction of buffer copies might constitute a fair use under current law. Section 104 Report at 144-45. However, the Register expressed no confidence in that position, calling it "fraught with uncertainty" and recommending legislation instead. *Id*. SoundExchange is aware of no court that has embraced that position in the 21 years since. The case cited by Music Choice certainly does not do so. That case involved no fair use issue at all. The language quoted by Music Choice concerns fixation rather than fair use, and in a very different context than operation of a BES. *IMAPizza, LLC v. At Pizza Ltd*., 965 F. 3d 871, 877 (D.C. Cir. 2020). Transmission of a picture across the internet is nothing like reproduction of the millions of copies of various types needed to operate a broadcast BES. Large-scale reproduction of copies of sound recordings in the operation of a commercial service simply does not constitute fair use. *See, e.g*., *A & M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1014-19 (9th Cir. 2001); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350-53 (S.D.N.Y. 2000).

surprisingly, the services in *Web I* relied on that report to make essentially the same arguments that Music Choice makes here. *See Web I* CARP Report at 97-98 (webcasting), 114-15 (BES). But the CARP rejected the argument that "the Copyright Office report . . . mandates that we set a zero or *de minimis* royalty" for BES ephemerals. *Id*. at 119 (emphasis in original). The CARP correctly noted that "Congress declined to adopt" the Office's position and recognized that it was "bound to apply the Copyright Law as presently enacted." *Id*. at 98; *see also id*. at 119. The CARP also noted that "the section of the report quoted . . . deals with webcasting, not background music." *Id*. On review, the Register and Librarian upheld the CARP and rejected the services' arguments. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240, 45,261 n.34 (July 8, 2002) (Section 104 Report has "no relevance to the current proceeding").

Fourth, the Section 104 Report no longer represents the Copyright Office's view of Section 112(e). The report was issued "[a]t a time when the technologies, legal landscape, and licenses themselves were very new." MC Brief at 22 n.2. "Twenty years later, much has changed on all fronts." *Id*. By 2005, the Register walked back her comments in the Section 104 Report, acknowledging "reasonable arguments" that both the performance and reproduction rights have "real value to the licensee," and instead describing her concern as relating to the efficiency of licensing practices. *Statement of Marybeth Peters the Register of Copyrights Before the Subcomm. on Intell. Prop., S. Comm. on the Judiciary*, 109th Cong. (2005), *available at* https://www.copyright.gov/docs/regstat071205.html.

In a much more recent policy report on the music marketplace, on which Music Choice also relies, MC Brief at 15, 16, 17, 20, the Register considered and declined to take up the suggestion of some commenters that the Section 112(e) license should be replaced with an

exemption. U.S. Copyright Office, Copyright and the Music Marketplace: A Report of the Register of Copyrights at 44, 46-47, 117 & n.627 (2015). Instead, the Register characterized the Section 112(e) and 114 licenses as "[o]ne of the few things that seems to be working reasonably well in our licensing system." *Id*. at 175. She acknowledged some suggestions that these statutory licenses be "tweaked," *id*. at 176, but made no specific recommendations, and certainly did not recommend repeal of Section 112(e). *See id*. at 176-79 & n.900. Music Choice has no basis for saying that the Register has "repeatedly" criticized Section 112(e). MC Brief at 32; *id.* at 23. If anything, the Register's 2001 preference to repeal Section 112(e) has been replaced by admiration.

Finally, the Register's old, nonbinding, and superseded recommendation does not even support Music Choice's argument when taken on its own terms. The Register's recommendation was directed to the making of temporary buffer copies by webcasters—not *all* ephemeral copies, let alone *any* ephemeral copies made by *BES*. That is clear both from the language used by the Register and the context in which she made her recommendation.

The Register suggested legislation precluding infringement liability for the reproduction of "*temporary buffer copies* that are incidental to a *licensed* digital transmission of a public performance of a sound recording and any underlying musical work." *Id*. at 142-43 (emphasis added). On its face, this language concerns only "temporary buffer copies." Those are less than all of the types of copies covered by the Section 112(e) license. Delivery of a broadcast BES requires making copies at every stage of operations, including quality control of incoming recordings, editing, compression, encryption, storage in a repertoire repository, backup, queueing of channel programming, transcoding, multiplexing and caching and buffering in the transmission process. *Web I* CARP Report at 117-18; Trial Testimony of Douglas G. Talley in Docket No.

2000-9 CARP DTRA 1 & 2, 8632:17-8633:14, 8634:17-8636:1, 8639:1-21, 8647:14-20, 8648:1-8649:14, 8656:15-8661:21, 8666:2-8667:1 (Sept. 6, 2001) (Ex. A to Decl. of Mary Marshall).

More fundamentally, the Register's language concerns only those temporary buffer copies made incidental to a "licensed" digital transmission. *Id*. at 142-43. Performances of sound recordings by a BES are exempt—not licensed. 17 U.S.C. § 114(d)(1)(C)(iv); *see also* Section 104 Report at 143 (referring to "licensed streaming"). The Register's use of the term "licensed" was intentional, as her recommendation had nothing to do with BES. Rather, the Register was concerned with the possibility of hold-up fees applied to licensed webcasters.[3] As she explained it, "the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place" by "seeking a second compensation for the same activity" licensed by performing rights organizations like ASCAP and BMI. Section 104 Report at 143; *see also* Web I CARP Report at 119. Noting a lack of "justification for the disparate treatment of broadcasters and webcasters regarding the making of ephemeral recordings," the Register "favor[e]d repeal of section 112(e)." *Id*. at 144 n.434. The Register's opinion had nothing to do with, and did not purport to apply to, BES providers, for which there is no "second compensation" concern. BES providers are exempt from paying for the performance of sound recordings and only must obtain license coverage, and pay compensation for, their reproductions of sound recordings.[4]

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[3] Music Choice's brief acknowledges as much, passingly referring to the Register's "focus[] on the context of musical works reproduction rights for licensed webcasters." MC Brief at 17.

[4] For use of musical works by webcasters, the Register's concern was soon addressed by an industry agreement, later codified in the Music Modernization Act, that only interactive webcasters would pay mechanical royalties for their reproductions of musical works, while other streaming services would not. *See* 17 U.S.C. § 115(e)(7), (13) (covered activity includes interactive streams, and interactive streams do not include streams exempt under Section

C. Music Choice's arguments concerning the value of BES ephemerals are contrary to *Web I* and every subsequent BES rate determination.

Music Choice concedes that the "ultimate question of the appropriate rate for the BES license is not at issue in this limited referral." MC Brief at 23. Nonetheless Music Choice argues over and over that ephemeral recordings have no independent value. MC Brief at 3, 7-8, 10-11, 16-23, 27-28, 32. Music Choice's lengthy arguments to this effect are beside the point and outside the scope of this referral. Moreover, they have never been accepted and demonstrate the illogic of Music Choice's position on the question that *was* referred to the Judges.

In *Web I*, AEI/DMX advanced a similar argument that BES ephemeral recordings had no independent economic value and warranted a rate that was "zero," "modest" or "*de minimis*." *Web I* CARP Report at 114, 119 (italics in original). Like Music Choice here, AEI/DMX attempted to support its argument by drawing comparisons with other kinds of services. *See* MC Brief at 32-34. These arguments were soundly rejected. The CARP noted both that "webcasting is an entirely different kind of business" and that "rates set for Subscription Services in a prior proceeding are just not comparable to rates under consideration in this proceeding." *Web I* CARP Report at 121; 67 Fed. Reg. at 45,265. For BES, "§ 112(e) is the only royalty which licensees must pay in order to make use of all sound recordings." *Web I* CARP Report at 121. That royalty could not be *de minimis* because, "[w]ithout such ephemerals, no broadcast service could be operated, and no revenue could be generated." *Id*. at 118. This was particularly so where "Congress knew that for years copyright owners have been collecting millions of dollars in

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114(d)(1) or subject to statutory licensing under Section 114(d)(2)); *see also* 17 U.S.C. § 115(c)(2)(G) (digital phonorecord delivery provisions of Section 115 do not apply to transmissions exempt under Section 114(d)(1)). This is why providers of broadcast BES do not need to pay reproduction royalties to musical work copyright owners and Music Choice "is not aware of any" demands for payment. MC Brief at 15.

royalties from background music companies for use of their sound recordings in those services." *Id*. at 119. After rejecting the services' arguments, *id*. at 119, the CARP applied the willing buyer/willing seller rate standard to set a rate of 10% of Gross Proceeds, based on marketplace benchmarks.[5] *Id*. at 120-28.

Ever since *Web I*, statutory royalty rates have remained the same or increased, until reaching the current rate of 13.25%. 69 Fed. Reg. 5693 (Feb. 6, 2004); 73 Fed. Reg. 16,199 (Mar. 27, 2008); 78 Fed. Reg. 66,276 (Nov. 5, 2013); 83 Fed. Reg. 60,362 (Nov. 26, 2018); 37 C.F.R. § 384.3(a)(1); 67 Fed. Reg. at 45,273-74. As a result, since 1998, BES providers have paid approximately $46 million in statutory royalties. *See* Ex. A, Declaration of Luke Malley at ¶3. In 2021 alone, SDARS and webcasters collectively paid about $40 million in ephemeral royalties. *Id.* ¶4. That is proof positive that ephemeral recordings have independent value. Music Choice's arguments to the contrary can't be reconciled with over 20 years of BES rate history.

D. Music Choice misrepresents SoundExchange's litigation positions concerning the value of ephemeral recordings.

Music Choice tries to twist SoundExchange's litigation positions in rate-setting proceedings involving SDARS and webcasters into some kind of concession about the value of ephemeral recordings made by a BES. *See* MC Brief at 3, 8, 11, 16, 19, 20-22, 23, 28, 32, 34. But the truth is that SoundExchange has always maintained that ephemeral recordings have value.

[5] Music Choice devotes an extended footnote to relitigating the CARP's rate decision. MC Brief at 22 n.2. This is not the forum for litigating rates, MC Brief at 23, so it is not necessary to respond in detail. Suffice it to say that the Register/Librarian affirmed the CARP's reliance on existing BES direct license agreements as benchmarks, finding the CARP's adoption of a 10% rate based on those agreements to be "well-founded and supported by the record." 67 Fed. Reg. at 45,243; *see also id*. at 45,265. The Judges are obligated to act in accordance with this precedent. 17 U.S.C. § 803(a)(1).

Unlike BES, SDARS and webcasters operate under both the Section 114 and 112(e) licenses. Thus, in proceedings to set rates for SDARS and webcasters, the Judges must set rates under both licenses. MC Brief at 19. Pricing each right is tricky, as the benchmark agreements relied on by the Judges convey both performance and reproduction rights in a bundle, without pricing either separately. The bundling of these rights makes their separate valuation economically indeterminate, requiring "additional data or information from which to identify or reasonably estimate the revenues attributable to each item in the bundle." *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56,725, 56,734 (Nov. 30, 2017).

SoundExchange's expert, Dr. George S. Ford, offered a solution to that problem in written testimony that was designated and admitted into evidence in *Web V*. *See* Ex. B. Dr. Ford observed that webcasters do not "have any economic interest" regarding the allocation between those rights. *Id*. at 10. His key insight was to address the economic indeterminacy of the benchmark agreements by setting a bundled Section 112/114 rate and allocating that rate between the two rights based on an agreement between the parties that care about that allocation—artists and copyright owners. *Id*. at 12-15. The Judges found Dr. Ford's testimony "persuasive" and set a bundled Section 112/114 royalty, with 5% of the bundled royalty allocated to ephemerals and 95% allocated to performances.[6] 86 Fed. Reg. at 59,584, 59,593.

[6] Music Choice is incorrect that the Section 112(e) royalty is part of the Section 114 royalty. MC Brief at 20-22. Rather, each is a component of a bundled royalty. *Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V),* 86 Fed. Reg. 59,452, 59,584 (Oct. 27, 2021) (referring to "the inclusion of ephemeral recordings royalties within a bundled rate for performances and ephemerals").

Music Choice's mischaracterizations to the contrary, Dr. Ford could not have been clearer that "it is beyond serious question that ephemeral copies of sound recordings have economic value." Ex. B at 10; *see also id*. at 3. This is because "services that publicly perform sound recordings . . . cannot as a practical matter properly function without those copies." *Id*. at 9. That is why marketplace agreements for streaming services convey both performance rights *and* ephemeral reproduction rights. *Id*. at 10. Including ephemeral rights in marketplace agreements "would be economically irrational if they had no value." *Id*. at 11 n.19.

Again, SoundExchange has never suggested that the ephemeral reproduction right has no value. Further, SoundExchange's statements in prior *webcasting* and *satellite radio* proceedings are simply irrelevant to the matter at hand, because they have nothing to do with how to interpret 37 C.F.R. § 384.3(a), or even with how to set a pure Section 112 royalty for BES. BES are situated differently than webcasters and SDARS. Unlike those other services, they enjoy an exemption from the performance right and are legally entitled to transmit their services royalty-free if they adopt a technology that involves making no copies. But they are required to pay a fair market value royalty if they choose to make copies and rely on the Section 112(e) license to cover those copies. *See* 17 U.S.C. § 112(e)(4). Because BES providers inevitably choose technological architectures that involve making copies of recordings, "one could say that the Section 114 right has zero economic value *without* the Section 112 right." Ex. B at 10 (emphasis added).

E. The supposed nature of the BES license is not helpful in discerning the intent of 37 C.F.R. § 384.3(a).

After spending many pages of its brief arguing against the Section 112(e) license for BES and the rates that have been set under that statutory license for more than two decades, Music Choice argues that this asserted "context" supports its interpretation of 37 C.F.R. § 384.3(a) as permitting allocation of revenues based on channels, subscribers, or copies, or some combination

of them. MC Brief at 23, 27-29, 32-34. It does no such thing. Even if Music Choice were right about the nature of the BES license (and it is not, *see supra*), its arguments are not useful in discerning the intent behind the definition of Gross Proceeds. There is no evidence that the Register and Librarian thought about any of the things Music Choice claims at the time they drafted that definition.

First, their *Web I* decision contains not a hint of antipathy towards the Section 112(e) license for BES. Its description of the license is straightforward and factual. *E.g.*, 67 Fed. Reg. at 45,263 ("Congress did not exempt [BES] from copyright liability when making copies of these works in the normal course of their business. Rather, Congress created a statutory license to cover the making of ephemeral recordings by these services."). And even if the Register then believed the things said passingly about the Section 112(e) license for webcasters in the Section 104 Report, she expressly disclaimed their relevance to the *Web I* proceeding. 67 Fed. Reg. at 45,261 & n.34 (Section 104 Report has "no relevance to the current proceeding"). She hardly could have been clearer that this was not a factor in formulating the BES Gross Proceeds definition.

Second, the *Web I* decision gives no credence to arguments that BES ephemeral recordings have no value (independent or otherwise). The Register and Librarian were well aware that services had made arguments to the CARP about the value of ephemeral recordings similar to those made by Music Choice here. The CARP rejected those arguments, *Web I* CARP Report at 98-99, 119, and the Register and Librarian took no exception to that conclusion. 67 Fed. Reg. at 45,261, 45,263, 45,264. Rather, they noted that "these businesses have always paid for such copies," 67 Fed. Reg. at 45,263, and affirmed the 10% rate set by the CARP, *id*. at 45,265. There is absolutely no hint that the Register recommended and the Librarian adopted the definition of

Gross Proceeds because they perceived that BES ephemerals have low value. That would have been contrary to their rate determination.

Finally, arguments made by SoundExchange in later proceedings, and decisions made by the Judges in subsequent proceedings, obviously could not have influenced the earlier action by the Register and Librarian in formulating the Gross Proceeds definition. *See Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("[a]rguments based on subsequent legislative history . . . should not be taken seriously").

II. The Judges should adopt SoundExchange's interpretation of the regulation.

A. 37 C.F.R. § 384.3(a) is ambiguous.

Music Choice makes a perfunctory argument that 37 C.F.R. § 384.3(a) "is perfectly clear." MC Brief at 24. But the District Court has already decided that 37 C.F.R. § 384.3(a) is ambiguous, and Music Choice's argument cannot be reconciled with the text of 37 C.F.R. § 384.3(a).

1. The Judges are bound by the District Court's finding that 37 C.F.R. § 384.3(a) is ambiguous.

The District Court's referral to the Judges was predicated on the Court's inability to parse the regulatory text without examining its context and its drafters' intent. The Judges must not sidestep the interpretive exercise requested by the Court by pretending the text is clear.

The Court stated expressly that "the Board's definition of 'Gross Proceeds' in 37 C.F.R. § 384.3(a) is ambiguous and do[es] not, on [its] face, make clear whether [Music Choice's] approaches were permissible under the regulations." *SoundExchange, Inc. v. Music Choice*, No. 19-999 (RBW), 2021 WL 5998382, *4 n.2 (quoting *SoundExchange, Inc. v. Sirius XM Radio Inc.*, 65 F. Supp. 3d 150, 155 (D.D.C. 2014) (alterations in original)). Music Choice mischaracterizes the Court's statement as one concerning ambiguity only as to the propriety of Music Choice's methodology, but not the regulatory text itself. *See* MC Brief at 25 n.3. That simply isn't what

the Court said. Indeed, the Court had no information about the details of Music Choice's methodology such that it could have formed an opinion about it.

Under the law of the case doctrine, the Judges should defer to the Court's finding that 37 C.F.R. § 384.3(a) is ambiguous. This doctrine is based on the straightforward proposition that "[j]ustice requires that a party have a fair chance to present his position," but not "more than one fair opportunity." *Retail Clerks Union, Loc. 1401 v. N.L.R.B*., 463 F.2d 316, 322 (D.C. Cir. 1972). "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). More specifically, the doctrine is "a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (*i.e*., established as the law of the case) by that court or a higher one in earlier phases." *Ferring Pharms., Inc. v. Azar*, 296 F. Supp. 3d 166, 175 (D.D.C. 2018) (internal citations and quotation marks omitted). "The law-of-the-case may be revisited only if there is an intervening change in the law or if the previous decision was 'clearly erroneous and would work a manifest injustice.'" *Kimberlin v. Quinian*, 199 F.3d 496, 500 (D.C. Cir. 1999) (quoting *LaShawn A. v. Barry*, 87 F. 3d 1389, 1393 (D.C. Cir. 1996)); *see also U.S. v. Thomas*, 572 F.3d 945, 948 (D.C. Cir. 2009).

The law of the case doctrine "applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson v. Colt Industries Operating Corp*., 486 U.S. 800, 816 (1988). Thus, for example, "[f]ederal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts." *Id*. While commonly stated as rules that apply among courts, the same principles apply when administrative agencies are involved as well. *Retail Clerks Union*, 463 F.2d at 322 ("These doctrines and concepts have a rightful and reasonable

application to the workings of administrative agencies."); *Frattaroli v. N.L.R.B.*, 590 F. 2d 15, 17 (1st Cir. 1978) ("The Board is not free to ignore or disagree with this court's pronouncements of law."); *Ferring*, 296 F. Supp. 3d at 175-78.

If the Court thought that 37 C.F.R. § 384.3(a) was unambiguous, then it would have had no reason and no basis for this referral. Rather, the Court made the referral because "this case is not 'within the conventional experience of judges' and 'is particularly within the [Board's] discretion.'" 2021 WL 5998382, *10 (quoting *United States v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 68, 78 (D.D.C. 2011)). In reaching this conclusion, the Court emphasized the Copyright Royalty Judges' "power to resolve ambiguity in the meaning of regulations" and "the general principles of administrative law, under which courts defer to agencies' reasonable interpretations of ambiguous regulations." 2021 WL 5998382, *4. The Court highlighted the need for the Copyright Royalty Judges' "unique knowledge" and "technical and policy expertise" in resolving the regulation's ambiguity. 2021 WL 5998382, *9; *see also id*. at 12 ("the issue raised by this case requires the expertise of the Board"). It concluded that, "it is absolutely appropriate for the Court to refer disputes over ambiguous statutory or regulatory interpretation to the Board when in the Court's discretion the Board is best suited to offer guidance in the first instance due to its expertise." 2021 WL 5998382, *10.

Given the above language, there can be no serious doubt that the District Court viewed 37 C.F.R. § 384.3(a) as ambiguous. That is the law of the case, and there has been no intervening change or clear error that might warrant reconsideration of it. *See Kimberlin*, 199 F.3d at 500. Thus, Music Choice is wrong that the "sole concern" in this referral "is whether the Judges find the Gross Proceeds definition ambiguous." MC Brief at 25 n.3. The sole concern in this referral is how to best interpret the irreducibly ambiguous text contained in 37 C.F.R. § 384.3(a). *See* 2021

WL 5998382, *12 ("referring the question of regulatory interpretation raised by this case to the Board pursuant to the doctrine of primary jurisdiction"). The Court expected the Judges to do more than simply read 37 C.F.R. § 384.3(a) and report back that its words are clear. The Judges should apply their expertise to interpret 37 C.F.R. § 384.3(a) based on its context and its drafters' intent. They should not attempt to reverse the District Court's settled conclusion that the regulation is ambiguous.

2. 37 C.F.R. § 384.3(a) is in fact ambiguous and must be interpreted based on its context and its drafters' intent.

Even if the ambiguity of 37 C.F.R. § 384.3(a) were not entitled to deference as the law of the case, the provision is in fact ambiguous and thus must be interpreted based on its context and its drafters' intent.

SoundExchange agrees with Music Choice that regulations should be interpreted using the same basic principles of construction that apply to statutes. MC Brief at 24. Those principles start with the text, but require "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and that one should "fit, if possible, all parts into an harmonious whole." *F.D.A. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (quoting *F.T.C. v. Mandel Brothers, Inc.*, 359 U. S. 385, 389 (1959)). Music Choice's construction of 37 C.F.R. § 384.3(a) "amounts to little more than simply pointing to the ambiguous phrases and proclaiming them clear." *See United States v. Yermian*, 468 U.S. 63, 77 (1984) (Rehnquist, C.J., dissenting). In truth, when applying basic interpretive principles to 37 C.F.R. § 384.3(a), the text doesn't take one very far.

As explained in SoundExchange's opening brief, any effort at a "plain language" reading of 37 C.F.R. § 384.3(a) runs into at least two difficult challenges.

First, how should one read the language following the word "including," which appears early in the definition of Gross Proceeds? *See* 37 C.F.R. § 384.3(a)(2). The words of the regulation do not reveal whether the remainder of 37 C.F.R. § 384.3(a)(2) consists of illustrative examples of the kinds of fees and payments included in Gross Proceeds, just one illustrative example, or (as Music Choice implies) one or more illustrative examples plus some words that modify the fees and payments included at the beginning of the definition of Gross Proceeds. SX Brief at 22.

Second, what should be made of the regulation's two uses of "derived from," one appearing in paragraph (a)(1) and the other in paragraph (a)(2)? SX Brief at 21. SoundExchange agrees with Music Choice that it is desirable to interpret a regulation to give effect to every part of it. MC Brief at 24-26; SX Brief at 22. However, it isn't obvious how to give effect to both of the "derived from" clauses in 37 C.F.R. § 384.3(a). Music Choice's interpretation simply ignores the "derived from" clause in paragraph (a)(1). The truth of the matter is that there is no entirely satisfying way to read the plain text of paragraphs (a)(1) and (a)(2) together as "an harmonious whole."

Music Choice's interpretation of 37 C.F.R. § 384.3(a) also cannot be reconciled with the PSS ephemeral royalty provision as it existed during 2013-2017. SX Brief at 26-27. For that period, both the BES and PSS regulations similarly used the word "solely" in their ephemeral recordings royalty provisions. 78 Fed. Reg. 23,054, 23,097 (Apr. 17, 2013) (adopting 37 C.F.R. § 382.3(c)). If Music Choice's interpretation of the word "solely" were correct, then it would owe royalties for copies used in either its BES or its PSS, *but not in both*—a perverse and inexplicable result.

This is a classic case of an ambiguous text. The ultimate goal is to discern "intent as embodied in" the language involved. *Chickasaw Nation v. U.S.*, 534 U.S. 84, 94 (2001). To do that, the Judges may look elsewhere for useful information. *See, e.g., King v. Burwell*, 576 U.S.

473, 492-96 (2015) (relying on overall operation of statutory scheme); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."). For example, where the dispute involves the proper meaning of a regulation, the Judges may "decide which among several competing interpretations best serves the regulatory purpose." *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). That is what the Judges should do in this proceeding by interpreting 37 C.F.R. § 384.3(a) based on its context and its drafters' intent as described below.

The cases cited by Music Choice are inapposite. In *Lamie v. U.S. Tr.*, 540 U.S. 526 (2004), the Court merely said it was obligated to follow the *unambiguous* text of a statute unless the disposition required by that text was absurd. *Id*. *Lamie* did not concern an ambiguous text, let alone advance any proposition of law as to the sources a court can consider when seeking to understand or interpret an ambiguous text. *See* MC Brief at 24. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494-95 (D.C. Cir. 2004) is even less relevant; it simply cited *Lamie* for the unremarkable proposition that plain language should be respected. Neither of these cases is informative as to how the Judges should interpret the ambiguous language of 37 C.F.R. § 384.3(a).[7]

[7] Music Choice's suggestion of a more rigorous rule against surplusage for "limiting language," MC Brief at 25-26, likewise has no basis in the case law it cites. Most of the cited cases simply refer to the undisputed principle that courts should try to give effect to all parts of a text. One of those was actually applying an analogous provision of the nineteenth century Louisiana Civil Code, which obviously has no relevance here and now. *Burdon Cent. Sugar Ref. Co. v. Payne*, 167 U.S. 127, 142 (1897). The one case from which Music Choice quotes relevant-sounding language is *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). However, Music Choice takes out of context half of an observation about a particular statute. What the Court actually said was "Just as the absence of limiting language in § 17(a) resulted in broad coverage, the presence of limiting language in § 12(2) requires a narrow construction." 513 U.S. at 577. That is not a statement of the general rule Music Choice suggests.

B. The Judges' rulings concerning the royalty bases for other percentage-of-revenue rates do not support Music Choice's interpretation of 37 C.F.R. § 384.3(a).

Music Choice argues that the Judges' rulings concerning rates for SDARS and for mechanical royalties paid by interactive streaming services establish "that revenues unrelated to the particular statutory license at issue 'should not be included in the revenue base'" when computing royalties. MC Brief at 29-31. These precedents do not support Music Choice's interpretation of 37 C.F.R. § 384.3(a), as they involve very different regulatory schemes. The SDARS percentage-of-revenue royalty calculation involves an intricate definition of Gross Revenues, 37 C.F.R. § 382.22, as well as a lengthy rule for calculating payments by taking into account use of direct-licensed recordings, 37 C.F.R. § 382.23. The rate calculation for interactive streaming mechanical royalties is even more elaborate. *See* 37 C.F.R. §§ 385.2, .21, .22. By contrast, the BES statutory royalty calculation was based on marketplace precedent and expressly selected for its simplicity. *Web I* CARP Report at 126-27. The Register and Librarian accepted the suggestion "that the determination of what constitutes 'gross revenues' is not a mystery and that it is merely the amount the Business Establishment Services receive from their customers for use of the music." 67 Fed. Reg. at 45,268. That was the intention of 37 C.F.R. § 384.3(a). Later pronouncements about details of different regulations do not shed any light on that intention.

Music Choice also draws an unwarranted conclusion from these later cases. Those proceedings involved specific disputes about the relatedness of particular *revenue streams* to a licensed product offering. For example, in *Phonorecords III*, the Judges determined that "revenues from product offerings unrelated to the section 115 license"—such as revenue from concert ticket sales—"should not be included in the revenue base for calculation of section 115 royalties." *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords*

(Phonorecords III), 84 Fed. Reg. 1918, 1961 (Feb. 5, 2019). But no one here is suggesting that 37 C.F.R. § 384.3(a) requires payment of statutory royalties based revenue from any kind of offering other than a BES (such as Music Choice's PSS), nor does this referral concern questions like whether BES equipment revenue should be included in Gross Proceeds.

For clarity, Music Choice does not earn delimited streams of revenue from BES channels that do or do not use "incremental" ephemeral copies. Its BES services are neither marketed nor sold to business subscribers based on such an obscure criterion. Instead, Music Choice's decision to use this criterion to allocate only a fraction of its revenue to its royalty base is a purely internal bookkeeping matter (and one that uses an opaque methodology based on channels, subscribers, copies, or some combination). The precedent cited by Music Choice doesn't speak to the propriety of that practice.

C. A BES provider should pay a percentage of all its music revenues as compensation for its option to use as many works and make as many copies as it desires.

To find the intent behind the definition of Gross Proceeds, the Judges should look to *Web I*, where that intent was laid out by the CARP, Register, and Librarian. *See* SX Brief at 9-12, 27-35. The *Web I* record makes clear that, rather than engaging in the allocations Music Choice advocates, BES providers should pay a royalty that is a percentage of "the amount the Business Establishment Services receive from their customers for use of the music." 67 Fed. Reg. at 45,268.

As explained in SoundExchange's opening brief, the *Web I* CARP adopted a payment provision corresponding to current paragraph (a)(1) and did not think a further definition of Gross Proceeds was necessary. *Web I* CARP Report at 127; SX Brief at 9. The CARP specifically declined to adopt any deductions from gross proceeds, because it found that most of the marketplace benchmarks it considered had no such deductions. *Web I* CARP Report at 125.

The definition of Gross Proceeds in paragraph (a)(2) has its origin in the *Web I* decision of the Register/Librarian. SX Brief at 11-12, 34-35. However, the Register and Librarian mostly affirmed the CARP's decision concerning BES rates. And the Register and Librarian were sympathetic to the CARP's view that a simple royalty payment provision was sufficient. Crediting testimony of an AEI/DMX witness explaining that gross proceeds "is merely the amount the Business Establishment Services receive from their customers for use of the music," they found that "the definition may be as simple as the CARP's characterization of the term." 67 Fed. Reg. at 45,268.

The stated purpose of the Register and Librarian in adopting the original version of the definition now found in paragraph (a)(2) was to be more specific about whether Gross Proceeds include "in-kind payments of goods, free advertising or other similar payments for use of the license." *Id*. Specifically, the Register and Librarian explained that they decided "to expand on the CARP's approach and adopt a definition of 'gross proceeds' which clarifies that 'gross proceeds' shall include all fees and payments from any source, including those made in kind, derived from the use of copyrighted sound recordings to facilitate the transmission of the sound recording pursuant to the section 112 license." *Id*. (emphasis added). That explanation fairly closely follows current 37 C.F.R. § 384.3(a)(2), but conspicuously omits the words "sole purpose."

The Register and Librarian did not specifically explain the "sole purpose" language. However, in its discussion of the Gross Proceeds definition, their decision does use the word "solely" in one place to refer to the source of proceeds, not the use of copies. 67 Fed. Reg. at 45,268 (explaining that AEI/DMX argued that RIAA's proposed definition of Gross Proceeds was "utterly contrary to the normal practice of using proceeds derived solely from the delivery of copyrighted sound recordings to business establishments"). This reference can reasonably be read

as an indication that what the Register/Librarian intended with the "sole purpose" language was to refer to the source of the "fees and payments" included in Gross Proceeds. Such an interpretation would be consistent with the principle that revenues unrelated to BES should not be included in Gross Proceeds. *See* MC Brief at 29.

It would make no sense to attribute to the "sole purpose" language the effect desired by Music Choice—drastically reconfiguring the CARP's decision *sub silentio*. SX Brief at 35. As Music Choice concedes, "the definition of 'Gross Proceeds' does not specify precisely how a BES provider should go about allocating revenues between those that should be included within 'Gross Proceeds' and those that should not." MC Brief at 25. This omission is important, because the CARP, Register, and Librarian clearly knew how to write an allocation formula if they wanted one—they wrote such a formula for allocation based on the use of public domain works. *Web I* CARP Report at 127 n.79; 67 Fed. Reg. at 45,274. It is not credible to think that the Register and Librarian would have adopted an intricate formula for addressing the minor issue of public domain recordings, while authorizing allocations of the type and on the scale made by Music Choice without providing any guideposts at all.

Music Choice's view that the "sole purpose" language makes BES royalties usage-based (*i.e.*, based on incremental ephemeral copies made solely to facilitate BES transmissions), MC Brief at 26, 31, is also at odds with the fundamental decision made by the CARP and affirmed by the Register/Librarian that the Section 112(e) license was intended as a "blanket license which would afford each licensee all the rights necessary to operate" a BES, including "the right to make any and all ephemeral copies utilized in a" BES. *Id*. at 118; 67 Fed. Reg. at 45,263 ("This interpretation of the law is consistent with the purpose of the section 112 license."). Blanket

licenses are ones where the fees "do not directly depend on the amount or type of music used."[8] The licensee enjoys the flexibility of being able to make more or less usage without cost impact, and in the case of the BES license, without needing to account for the particular ephemeral copies made, which an AEI/DMX witness testified would be difficult or impossible. SX Brief at 18 n.18. There is no reason to think the Register and Librarian intended to use the words "sole purpose" to fundamentally rework the blanket BES license into one with a usage-based payment model, and there is certainly nothing in the history of the regulations suggesting that was their intention.

III. Music Choice's suggested allocation methodology is unreasonable.

Music Choice concludes by asking the Judges to tell the District Court that the propriety of its actions should be judged based on a "'reasonableness' standard that allows different BES providers to apportion revenues in a way that makes sense for their particular circumstances." MC Brief at 37. This discussion serves primarily to highlight that Music Choice's interpretation of 37 C.F.R. § 384.3(a) leads to results that are not remotely administrable and, as such, could not have been intended by the drafters of the regulation's predecessor.

Music Choice rightfully notes that "the regulatory royalty formula at issue does not provide a specific approach for allocating revenues between those included in Gross Proceeds and those excluded." MC Brief at 35. This observation ought to serve as a bright red warning flag that Music Choice's interpretation of 37 C.F.R. § 384.3(a) is wrong. To be sure, statutory royalty

[8] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc*., 441 U.S. 1, 4 (1979); *see also Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5807, 2013 WL 12114098, *4 (E.D. Pa. December 23, 2013) ("A blanket license gives the music user (the licensee) the right to perform all of the works in the repertory of that particular PRO for a pre-determined license fee (*i.e*. without regard for how many musical works are actually publicly performed).); *U.S. v. A.S.C.A.P*., 157 F.R.D. 173, 204-05 (S.D.N.Y. 1994) ("blanket license is a license which enables the music user, for a pre-determined fee, to use as much or as little ASCAP music in its programming as it wishes"); SX Brief at 29-30 & n.20.

allocations must be reasonable, but they must also be precise, accurate, and methodologically transparent. 82 Fed. Reg. at 56,732; SX Brief at 18-19. Music Choice provides none of that. A Register and Librarian concerned about the specificity of statutory license terms would not have adopted the scheme Music Choice advocates. *See* 67 Fed. Reg. at 45,268.

Music Choice offers multiple examples of how its approach could play out. For instance, a BES provider that transmits 50 channels to a subscriber but "create[s] new copies to transmit the sound recordings" in only five of those 50 channels could "only include 10% of that subscriber's revenue in Gross Proceeds." MC Brief at 36 n.4; *see also id*. at 1. But "[f]or another service, it may be appropriate to look to some other relevant technical feature of its distribution platforms to best determine what portion of the revenue should be included in Gross Proceeds." *Id.* at 37.

What Music Choice tries to characterize as a "flexible" approach is something closer to anarchy. Each BES provider would retain sole and largely unaccountable discretion to compute Gross Proceeds in any manner it sees fit. The Judges need look no further than Music Choice's own examples to see why such discretion is problematic. In Music Choice's first example, Gross Proceeds are allocated on a channel-by-channel basis, depending on whether the channel did or didn't utilize "new copies." But why does this make any sense? What if the five channels in question were the only ones that the business subscriber ever used—and the remaining 45 channels experienced no usage whatsoever? In that circumstance—where 100% of the subscriber's usage relies on the licensee's new reproduction of ephemeral copies—is it "reasonable" to allocate only 10% of that subscriber's revenue to Gross Proceeds? Would it be more "reasonable" to allocate based on the number of copies made?[9]

[9] For computing a usage-based adjustment to SDARS royalties, the Judges have specified an exact formula (which takes into account actual usage) and required Sirius XM to report details of

And assuming there is a disagreement on the answers to the foregoing questions, how should they be resolved? In Music Choice's view, the service provider should be in the driver's seat, free to "apportion revenues in a way that makes sense for" it. MC Brief at 37. Just as Music Choice has hidden the details of its allocation methodology from SoundExchange for years, Music Choice does not suggest that any allocation decisions made by a service provider should be disclosed. Thus, royalty recipients would be left with no recourse other than to pursue the same arduous steps that SoundExchange has taken in this case. That is, any disagreement over a licensee's royalty base would have to be uncovered by SoundExchange's verification function, then be litigated in court in the event of a disagreement, and then potentially be brought to the Judges for further regulatory clarification. This is gratuitously costly—and SoundExchange would be forced to pick up the tab for audits whose purpose would simply be to understand a licensee's otherwise-obscure methodology. *See* 37 C.F.R. § 384.6(g) ("The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more").

Moreover, this "every service for itself" approach would require SoundExchange's verification procedure to serve a highly technical policing function it was never designed to satisfy. The regulations require SoundExchange' verification procedure to be conducted by a certified public accountant. *See* 37 C.F.R. §§ 384.2, 384.6(c). But in order for these audits to be effective, the CPAs in question would have to assess which of a Licensee's channels, or subscribers, or subscription packages, did or didn't utilize "new" server, cache, buffer, and other ephemeral copies. Or, to use one of Music Choice's own examples, the auditor may have to "look to some

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the calculation to SoundExchange on a monthly basis. 78 Fed. Reg. 23,054, 23,072-73, 23,098-99 (April 17, 2013).

other relevant technical feature of [a Licensee's] distribution platforms" to determine what revenue should properly be included in Gross Proceeds. MC Brief at 37. SoundExchange is unaware of any CPA with qualifications to engage in the wide-ranging and highly technical investigation of a BES that would be required to verify the propriety of the allocations Music Choice would permit. This is plainly not what the BES verification procedure was designed to do.

The Judges can and should consider the administrability of what Music Choice is proposing as they evaluate the alternative approaches to interpretation of 37 C.F.R. § 384.3(a). Courts and agencies regularly consider the effects of possible interpretations on systems like the statutory license.[10] The Judges should be loath to adopt an interpretation of 37 C.F.R. § 384.3(a) as unworkable as what Music Choice proposes.

CONCLUSION

For the foregoing reasons, the Judges should issue an order clarifying that 37 C.F.R. § 384.3(a) requires BES providers to calculate royalties using their total gross proceeds derived from the use of copyrighted recordings in a BES, regardless of whether operation of the BES involves copies or channels that are also used as part of a PSS.

[10] *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 393 (2016) (favoring a reading of statute that promoted the goal of "providing administrable standards"); *Roberts v. Sea-Land Services, Inc.,* 566 U.S. 93, 100 (2012) (crediting the only interpretation offered by a party that "supplies an administrable rule"); *U.S. v. Sun-Diamond Growers of California*, 526 U.S. 398, 409 (1999) (statute at issue should be interpreted by taking into account other "clearly framed and easily administrable provisions"); *Execution Protocol Cases*, 955 F.3d at 121 (rejecting interpretation of statute that "would make the federal death penalty virtually un-administrable"); *United States v. Spencer*, 739 F.3d 1027 (7th Cir. 2014) (favoring administrable reading of statute); *Adventist GlenOaks Hosp. v. Sebelius*, 663 F.3d 939, 944 (7th Cir. 2011) (upholding agency's interpretation of statute to accommodate policy that was "more readily administrable than alternatives").

Dated: June 6, 2022

Respectfully submitted,

By: */s/ Steven R. Englund*

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EXHIBIT A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)

DECLARATION OF LUKE MALLEY

I, Luke Malley, certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. My name is Luke Malley, and I am a Senior Licensing and Enforcement Analyst in the Legal Department at SoundExchange, Inc. ("SoundExchange").

2. On May 31, 2022, I reviewed books and records kept by SoundExchange in the ordinary course of its business and used this information to determine the amount of royalties paid as of that date by various types of services for their reproduction of ephemeral recordings under the statutory license provided by 17 U.S.C. § 112(e).

3. The records I reviewed indicate that, since 1998, business establishment services ("BES") have paid $46,437,840.71 in statutory royalties for the reproduction of ephemeral recordings.

4. The records I reviewed indicate that, for 2021, satellite digital audio radio services (SDARS) and webcasters collectively paid $40,265,792.90 in statutory royalties for the reproduction of ephemeral recordings.

Executed on 6/3/22

Luke Malley

EXHIBIT B

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings	Docket No. 2009-1 CRB Webcasting III

TESTIMONY OF

GEORGE S. FORD

President, Applied Economic Studies

September 2009

I. My Experience and Qualifications

My name is George S. Ford. I am the President of Applied Economic Studies, a private consulting firm specializing in economic and econometric analysis, located in Birmingham, Alabama. I am also the Chief Economist of the Phoenix Center for Advanced Legal & Economic Policy Studies, a Washington, D.C. based 501(c)(3) research organization that specializes in the legal and economic analysis of public policy issues involving the communications and technology industries. In addition, I am an Adjunct Professor at Samford University, a private university located in Birmingham, Alabama, where I teach economics in the graduate program of the business school. I serve as a member of the Alabama Broadband Taskforce upon appointment by Alabama Governor Bob Riley.

I received a Ph.D. in Economics from Auburn University in 1994. Since then, I have worked as a professional economist in both government and industry. In 1994, I became an economist in the Competition Division of the Federal Communications Commission, an organization located in the General Counsel's Office that provided competition analysis support to the many bureaus of that organization. My primary interests were multichannel video services and broadcasting policies, though my work ranged from international policy to radio interference standards to statistical analysis. After my government tenure, I became an economist at MCI Communications, where my work focused on telecommunications policy. In April 2000, I became the Chief Economist of Z-Tel Communications in Tampa, Florida, a small competitive telephone company where I performed both regulatory and business analysis. I have been in my present employment since the Summer of 2004.

My areas of specialty in economics include Industrial Economics, Regulation, and Public Policy, with an emphasis on the communications industries, including broadcast radio and television. I have written many papers on telecommunications and media policy, and much of this work has been published in economic and law journals including the *Journal of Law & Economics*, *Empirical Economics*, the *Journal of Business*, the *Journal of Regulatory Economics*, the *Antitrust Bulletin*, *Energy Economics*, the *Yale Journal on Regulation*, the *Federal Communications Law Journal*, and many others. I have testified before numerous public service commissions, state legislative bodies, and committees of the U.S. Congress on communications policy and rate setting. In June of this year, I filed testimony before the Copyright Royalty Judges in the Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-2005. A copy of my curriculum vitae is attached as Appendix A.

II. Summary of My Testimony

The purpose of this proceeding is to establish the rates and terms for certain digital public performances of sound recordings under Section 114 of the Copyright Act and for the making of ephemeral copies in furtherance of such performances under Section 112(e) of the Copyright Act. I was engaged by SoundExchange, Inc. to provide an economic framework useful for establishing a rate for ephemeral copies under the statutory license provided in Section 112(e) of the Copyright Act and to canvas available sources for information relevant to that task.

In the course of my work, I have been given free reign by SoundExchange to examine any sources that I believed might be relevant in setting a rate for ephemeral copies. I have reviewed the relevant statutory provisions and the various decisions of the CRB and its predecessor, the CARP, as well as the Register of Copyrights, interpreting

those provisions. I have familiarized myself with the terms of marketplace agreements for non-statutory forms of music streaming licensing. I have familiarized myself with the technological issues arising from ephemeral copies. I have conferred with SoundExchange's other expert, Dr. Michael D. Pelcovits, Ph.D. I have also carried out a free-ranging search of online materials in an effort to determine whether there is any information that would help establish the proper royalty rate for ephemeral copies in the webcasting context.

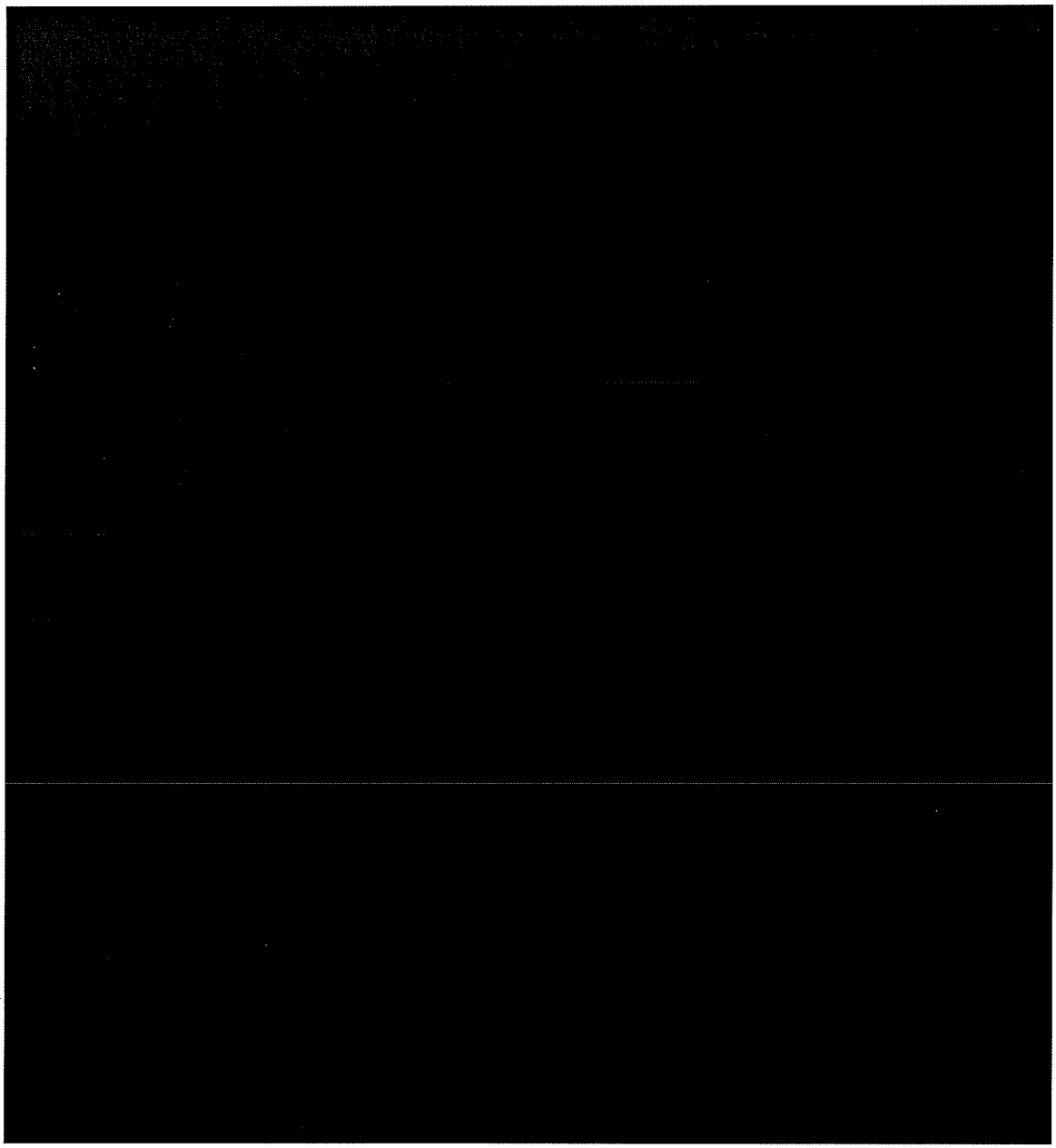
As I will explain below in further detail, I have concluded that sound principles of economic theory as well as observed marketplace benchmarks firmly establish that ephemeral copies have economic value. I have also concluded on the basis of marketplace benchmarks that the economic value of ephemeral copies is properly measured as a fixed percentage of the overall value of the rights acquired by webcasters under Sections 112 and 114. However, there exists very little in the way of traditional marketplace benchmarks to facilitate the proper computation of that percentage. This is because the hypothetical "marketplace" envisioned by Sections 112 and 114 is made up of actors with very different economic interests from the marketplace that exists outside of the statutory framework. In the unregulated marketplace, where copyright owners and services that publicly perform sound recordings freely negotiate to determine rates, the "willing buyers" and "willing sellers" are less concerned about the allocation of those royalty rates between payments for ephemeral copies and payments for public performances. However, when copyright owners and the service providers must abide by rates determined under Sections 112 and 114, the explicit allocation of payments between those two components becomes much more relevant, because the ephemeral copy payments under Section 112(e) are made

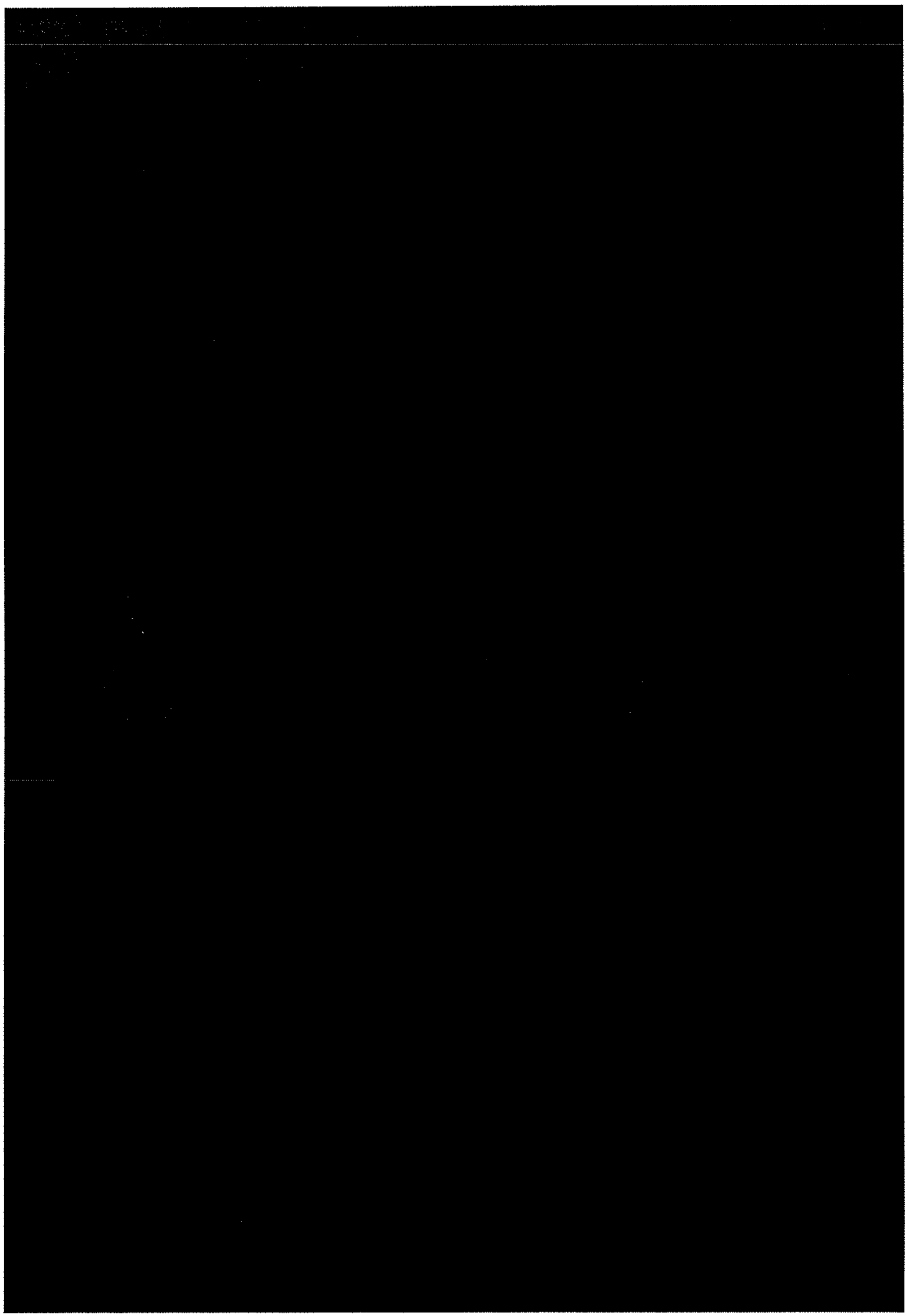
directly to copyright owners (or record companies in this case), while the performance payments under Section 114 are shared equally between copyright owners and artists. This particular division of payments is solely an artifact of the statute and does not bind or constrain market transactions.

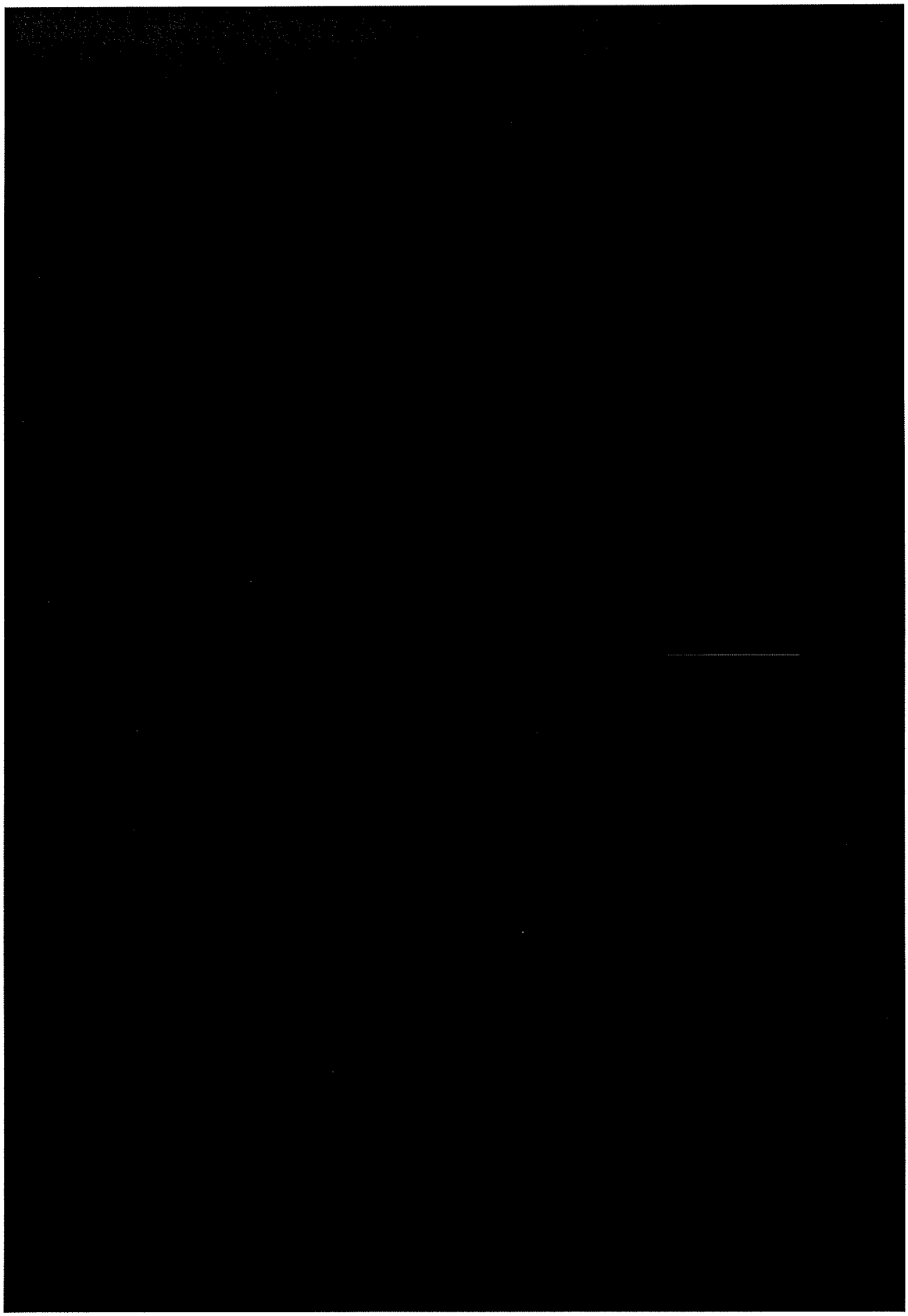
While this division of royalties among upstream providers makes little difference to the "willing buyer" in this hypothetical marketplace — that is, the webcasters — it makes a significant difference to the "willing seller" or "sellers", i.e., the record companies that own the rights to the sound recordings and the artists who get a share of the royalties. Record companies and artists care about what portion of royalty payments are allocated to ephemerals because the higher the portion allocated to ephemerals, the lower the portion paid directly to artists per the terms of the Section 114 license. Record companies and artists therefore have every incentive to negotiate over the proper percentage of royalty payments that are allocated to ephemeral copies. This negotiation is precisely what one would expect to happen in a hypothetical free market in which both artists and record companies are forced by statute to share 50-50 in performance royalty payments.

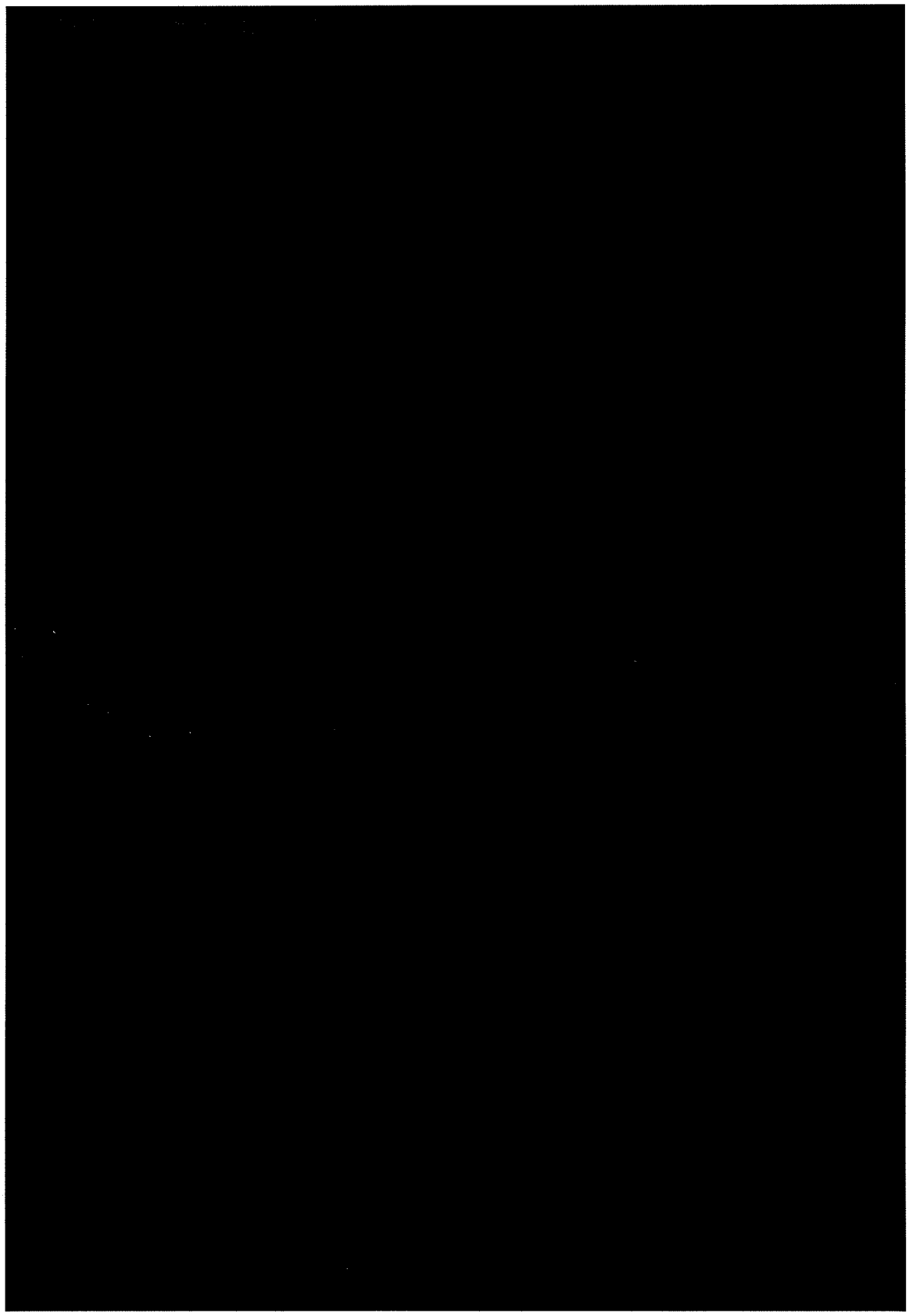
Such a negotiation is the basis of the rate proposal advanced by SoundExchange. SoundExchange, a collective made up of both record companies and artists, has proposed a rate that represents the result of negotiations between the artists and the record companies that make up its board. As long as the ephemeral rate is defined as a percentage subset of the total royalty payment, the willing buyer — the webcaster — is indifferent to the ephemeral copy rate. As such, marketplace negotiations between the "willing buyer" — the webcaster — and the "willing seller" — the copyright owner — while potentially informative, may or may not establish a specific ephemeral copy rate. From a ratemaking

standpoint, it does not matter. The SoundExchange proposal is what the willing seller in such a marketplace would propose. Because the willing buyer is indifferent, the rate proposed by SoundExchange is legitimately viewed as the proper marketplace rate for ephemeral copies. The proposal resolves the problem of a non-market allocation of royalties, and is the best evidence available of the market rate of, and rate mechanism for, ephemeral copies under Section 112.









IV. My Conclusions

Section 112(e), which governs the compulsory license for ephemeral copies, provides in relevant part that:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. . . . [16]

Despite minor differences in the language between Section 112(e)(4) (governing ephemeral licenses) and Section 114(f)(2) (governing statutory licenses for nonsubscription services and new subscription services), the economic criteria for setting rates and terms under those licenses are, in the words of the CARP, "essentially identical."[17] In measuring the value of the Section 112(e) statutory license, just as in measuring the value of the Section 114(f)(2) license, a key consideration in setting a proper rate is the identification of proper marketplace benchmarks. As the CARP has observed: "[T]he quest to derive rates which would have been observed in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements, if they involve comparable rights and comparable circumstances."[18]

As I will explain below, in reviewing the most closely analogous marketplace agreements, I come to three conclusions about the proper royalty rate for ephemeral copies under Section 112(e). First, marketplace benchmarks as well as basic economic theory demonstrate that ephemeral copies have economic value to services that publicly perform sound recordings because these services cannot as a practical matter properly function without those copies. Second, marketplace benchmarks show that the royalty rate for

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[16] 17 U.S.C. § 112(e)(4)

[17] Webcaster I CARP Opinion at 25; *see also* Webcaster II at 24100-01.

[18] Webcaster I CARP Opinion at 43; *see also* Webcaster II at 24092 ("we adopt a benchmark approach to determining . . . rates").

ephemeral copies, if directly established, is almost always expressed as a percentage of the overall royalty rate for combined activities under Sections 112 and 114. Third, because the only actors in the hypothetical three-party market established by the statute — webcasters, record companies, and artists — that have any economic interest in the measure of that allocation are the artists and the copyright owners, the agreement reached between them as to that allocation is the best measure of how a willing buyer and a willing seller would allocate royalty payments between performance royalties and ephemeral copies, and would value the ephemeral license in the course of a marketplace negotiation for public performances.

A. The Ephemeral License Has Economic Value.

As an initial proposition, it is beyond serious question that ephemeral copies of sound recordings have economic value. This is because, as Congress recognized in enacting Section 112(e), webcasters simply could not exist without the ability to make ephemeral copies. In fact, because webcasters must have both the ephemeral copy right as well as the performance right in order to operate their services, as a matter of economic theory one could say that the Section 114 right has zero economic value without the Section 112 right, and the Section 112 right has zero economic value without the Section 114 right. One cannot remove the Section 112(e) right from the full complement of rights required by webcasters any more than one can remove oxygen molecules from water and still have water.

This theoretical proposition is confirmed by a number of marketplace benchmarks. First, in the marketplace deals between record companies and webcasters for non-statutory forms of licenses, it is typical for ephemeral copy rights to be expressly included among the grant of rights provided to the webcaster. Most of these agreements do not set a

distinct rate for those ephemeral copies, incorporating them instead into the overall rate that the webcaster pays for the combined ephemeral copy rights and performance rights. Nonetheless, economic theory teaches that rational companies do not give away something for nothing. Because these ephemeral copy rights are essential for webcasters to operate their services, it follows that the value of ephemeral copy rights has been included in the overall rate that webcasters pay under these agreements.

Second, I am aware of several agreements over the years between record companies and services that publicly perform sound recordings that do establish specific rate mechanisms for ephemeral copies. For example, I have reviewed a current agreement between a major record label and a webcaster that covers ad-supported internet radio service, subscription radio service, and on-demand streaming and recites the parties' agreement that 10% of the royalty payments made under the agreement shall be designated as payment for ephemeral copies. Other agreements have contained similar language. For example, in Webcaster II and SDARS the CRJs were presented with evidence of agreements negotiated by Sony BMG and by Warner Music Group which provided that 10% of the overall fees for streaming are attributable to the making of ephemeral copies.[19]

[19] *See* Webcaster II at 24101. The actual rates established in such marketplace agreements, while potentially informative, are not necessarily the best proxy for the ephemeral rate in the instant proceeding. These agreements are made without statutory constraints on how ephemeral and performance royalties are allocated between copyright owners and artists. Had these agreements been bound by such statutory conditions, then the outcomes may very well have been different. But these agreements are relevant in two important ways: First, they demonstrate that willing buyers and willing sellers do trade in ephemeral rights, which would be economically irrational if they had no value. Second, as discussed more fully in the next section below, they demonstrate that the payments for ephemeral rights, even absent regulatory constraint, employ a percent-of-total mechanism where ephemeral royalties are expressed as a percentage of payments metered on performances.

Third, I am also aware that, more recently, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. In these agreements, the willing participants in the market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.[20]

B. It Is Appropriate to Express the Value of Ephemeral Copies as a Fixed Percentage of the Performance Royalty.

Setting the ephemeral rate as a share of the total performance royalty fee does no injustice to economic theory. In fact, marketplace benchmarks consistently confirm that a percent rate is the appropriate measure. The marketplace has spoken with near unanimity in structuring the Section 112(e) ephemeral reproduction license as a percentage of the Section 114 performance royalty where such performance royalty is established. As discussed above, I have seen numerous voluntary agreements between willing buyers and willing sellers in which the rate for the ephemeral reproduction license was expressed as a percent of the performance royalty. Similarly, as mentioned above, SoundExchange negotiated a number of voluntary agreements (with broadcasters, certain commercial webcasters and certain noncommercial educational webcasters) for the very same Section 112 and 114 rights at issue in this proceeding. There, again, the willing participants in the

[20] Notification of Agreements Under the Webcaster Settlement Act of 2008, Agreed Rates and Terms for Broadcasters, 74 Fed Reg. 9293, 9299 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Webcasts by Commercial Webcasters, 74 Fed Reg. 40614 (2009); Notification of Agreements Under the Webcaster Settlement Act of 2009, Agreed Rates and Terms for Noncommercial Educational Webcasters, 74 Fed Reg. 40614, 40616 (2009).

market agreed to structure the ephemeral reproduction rate as an allocation of the correlative performance royalty.[21]

Thus, it appears that, where a rate for ephemeral copies is set in the marketplace, it is set as a percentage of overall royalties. As a structural matter, the available evidence suggests that setting the ephemeral rate as a percent of an overall payment is consistent with marketplace negotiation.

C. The Best Market Benchmark is the Agreement Between Artists and Record Companies.

Having established that the Section 112(e) ephemeral reproduction right clearly has value and is best expressed as a percentage of the Section 114 performance royalty where such royalty is set, the final step in the analysis is to determine how to set an actual percentage as required by the Register. As noted above, most agreements that set a rate for ephemeral copies specify that rate as a percentage of total royalty payments. Given the nature of the rights at issue, that is not a surprising outcome. Where performance royalties for streaming activities are negotiated in a free market setting, that is, outside of the Section 114 context, the copyright owner (in this case the record companies) and the service provider should have less at stake with respect to the allocation of payments between ephemeral copies and performances.

By contrast, in the Section 114 context, Congress radically altered this market dynamic when it comes to statutory licenses. There is a very significant difference between payments under the Section 112(e) compulsory license and the Section 114 compulsory license: payments under Section 114 are by law split between copyright

[21] Although these agreements do not set the specific allocation, but leave that open to future determination, the point here is that the willing buyers and willing sellers agreed to structure the ephemeral rate as an allocation of the performance rate.

owners and artists, while payments under Section 112(e) go directly to copyright owners. The implication of this phenomenon is immediate. The sharing of income between record companies and artists for performances is set by law. Thus, if it is to have any relevance for the Judges, the willing buyer / willing seller market analysis suggested by Section 112(e) for ephemeral rates must reflect this statutory alteration to the market dynamics whereby the artists and the record companies jointly have a real interest in negotiating the Section 112(e) rate while the webcasters (as the willing buyers) do not.

By the very nature of the statute, the agreements reached under the constraints relevant in this proceeding will not be the same as in the unregulated market. Evidence suggests that the terms between the "willing buyer" in this hypothetical market — the webcaster — and the "willing seller" — the record companies — will either embody the ephemeral copy rate in the performance rate or express the ephemeral rate as a percent of the total overall performance royalty. If so, the buyer is indifferent to the allocation of payments between ephemeral copies and performance royalties. But the "willing seller" — the record companies — will not be so indifferent under the statutory division of royalties that cannot be assumed away. Under plausible conditions, only the record companies and artists are parties to the establishment of the ephemeral rate, and these parties have arrived at a royalty rate for ephemeral copies that reflects a more market based allocation of payments between ephemerals and performance royalties.

Because the willing buyer is disinterested with respect to that allocation, the agreement between the record companies and the artists thereby becomes the best indication of the proper allocation of royalties.

My understanding is that the recording artists and the record companies have reached an agreement that five percent (5%) of the payments for activities under Section 112(e) and 114 should be allocated to Section 112(e) activities. In light of the principles I have articulated above, that appears to be a reasonable proposal, and credibly represents the result that would in fact obtain in a hypothetical marketplace negotiation between a willing buyer and the interested willing sellers under the relevant constraints.

I declare under penalty of perjury that the foregoing testimony is true and correct.

Date: 9/29/09

George S. Ford

Appendix A

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EDUCATION:

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EXPERIENCE:

2000 - Present	**PHOENIX CENTER FOR ADVANCED LEGAL AND ECONOMIC PUBLIC POLICY STUDIES** **Washington, DC** Chief Economist
2006 - Present	**SAMFORD UNIVERSITY, Birmingham, Alabama** Adjunct Professor
2004 – Present	**APPLIED ECONOMIC STUDIES, Birmingham, Alabama** President
2000 – 2004	**Z-TEL COMMUNICATIONS** **Tampa, FL** Chief Economist, Strategic Policy and Planning
1996 - 2000	**MCI WORLDCOM CORPORATION** **Washington, D.C.** Senior Economist, Office of Policy and Strategic Planning
1994 - 1996	**FEDERAL COMMUNICATIONS COMMISSION** **Washington, D.C.** Economist, Office of the General Counsel & Cable Bureau, Competition Division

PUBLISHED RESEARCH:

"The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption," with T. R. Beard, L. J. Spiwak, and M. L. Stern. (Forthcoming in the *Federal Communications Bar Journal*).

"HAC Standard Errors and the Event Study Methodology: A Cautionary Note," with J. Jackson. (Forthcoming in *Applied Economics Letters*).

"Sample Size and the Accuracy of the Generalized Lambda Distribution," with S. Skinner. (Forthcoming in *Communications in Statistics - Simulation and Computation*).

"Network Neutrality and Foreclosing Market Exchange, " with T. R. Beard, T. M. Koutsky, and L. J. Spiwak. (Forthcoming in *International Journal of Management and Network Economics*).

"Developing a National Wireless Regulatory Framework: A Law and Economics Approach," with T. R. Beard, T. M. Koutsky, and L. J. Spiwak. *Commlaw Conspectus*, Vol. 16, 2008.

"Constituency Size and the Growth of Public Expenditures: The Case of the United Kingdom," with M. Thornton and M. Ulrich. *Journal of Public Choice and Finance*, Vol. 24, 2006 (published in 2008).

"The Competitive Effects of Quantity Discounts," with T. R. Beard and D. L. Kaserman. *Antitrust Bulletin*, Vol. 52, 2007.

"Network Neutrality and Industry Structure," with T. R. Beard, Thomas M. Koutsky and Lawrence J. Spiwak. *Hastings Communications and Entertainment (Comm/Ent) Law Journal*, Vol. 29, 2007.

"A La Carte and 'Family Tiers' as a Response to a Market Defect in the Multichannel Video Programming Market," with T. R. Beard and Thomas M. Koutsky. *CommLaw Conspectus*, Vol. 15, 2006.

"The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households," with Thomas M. Koutsky and Lawrence J. Spiwak. *I/S: A Journal of Law and Policy for the Information Society*, Vol. 3, 2007.

"Competition After Unbundling: Entry, Industry Structure and Convergence," with Thomas M. Koutsky and Lawrence J. Spiwak. *The Federal Communications Law Journal*, Vol. 59, 2007.

"Does Municipal Supply of Communications Crowd-Out Private Communications Investment? An Empirical Study." *Energy Economics*, Vol. 29, 2007.

"Broadband and Economic Development: A Municipal Case Study from Florida," with T. M. Koutsky. *Review of Urban and Regional Development Studies*, Vol. 17, 2006.

"The Economics of Build-out Rules in Cable Television," with T. M. Koutsky and L. W. Spiwak. *Hastings Communications and Entertainment (Comm/Ent) Law Journal*, Vol. 28, 2006.

"Issues in Empirical Merger Analysis," with T. Randolph Beard Introductory article by the Guest Editors in a Special Issue of the *International Journal of the Economics of Business*, Vol. 13, 2006.

"Empirical Simulation of Mergers: The Cingular and AT&T Wireless Merger," with T. Randolph Beard and Richard P. Saba. *International Journal of the Economics of Business*, Vol. 13, 2006.

"Event Studies for Merger Analysis: An Evaluation of the Effects of Non-Normality on Hypothesis Testing," with Audrey D. Kline. In *Antitrust Policy Issues*, Nova Publishers, 2006.

"Are Unbundled and Self-supplied Telecommunications Switching Substitutes? An Empirical Study," with T. Randolph Beard. *International Journal of the Economics of Business*, Vol. 12, 2005.

"Misleading Inferences from Panel Unit-Root Tests: A Comment," with John Jackson and Audrey Kline. *Review of International Economics*, Vol. 14, 2006.

"Splitting the Baby: An Empirical Test of Rules of Thumb in Regulatory Price Setting," with T. Randolph Beard. *Kyklos*, Vol. 58, 2005.

"Mandated Access and the Make-or-Buy Decision: The Case of Local Telecommunications Competition," with with T. Randolph Beard and Thomas W. Koutsky. *Quarterly Review of Economics and Finance*, Vol. 45, 2005. Presented at *The Drivers and Significance of Local Telecommunications Competition*, United States Department of Justice, July 23, 2002 as "Facilities-based Entry in Local Telecommunications: An Empirical Investigation").

"On the Relationship between Telecommunications Investment and Economic Growth: Three Empirical Studies," with R. Beil and J. Jackson. In *Economic Growth Issues*, Nova Publishers, 2005.

"On the Relationship between Telecommunications Investment and Economic Growth in the United States," with R. Beil and J. Jackson. *International Economic Journal*, Vol. 19, 2005.

"Access Charge Reductions and Long Distance Rates: A Bootstrap Analysis," with T. Randolph Beard, R. Carter Hill, and Richard P. Saba. *Empirical Economics*, Vol. 30, 2005.

"Fragmented Duopoly: A Conceptual and Empirical Investigation," with T. Randolph Beard, R. Carter Hill, and R. Saba. *Journal of Business*, Vol. 78, 2005.

"Competition and Investment in Telecommunications," with John D. Jackson. *Atlantic Economic Journal*, Vol. 32, 2004.

"Pursuing Competition in Local Telephony: The Law and Economics of Unbundling and Impairment," with T. R. Beard and R. B. Ekelund Jr., *Journal of Law, Technology and Policy*, Vol. 2003, Fall 2003.

The Financial Implications of the UNE-Platform: A Review of the Evidence," with T. Randolph Beard and Christopher C. Klein *CommLaw Conspectus: Journal of Communications Law and Policy*, Vol. 12, 2004. Also published in the handbook for the *21st Annual Institute on Telecommunications Policy & Regulation*, Practicing Law Institute, New York, 2003.

"Innovation, Investment, and Unbundling: An Empirical Update," with Robert B. Ekelund Jr., *Yale Journal on Regulation*, Vol. 20, 2003.

"Discrimination and Minority Ownership in Radio Broadcasting," with Audrey B. Davidson and Barry Hayworth, *International Journal of the Economics of Business*, Vol. 10, 2003.

"Preliminary Evidence on the Demand for Unbundled Elements in Telephony," with Robert B. Ekelund, Jr., *Atlantic Economic Journal*, Vol. 30, 2002.

"Demand Elasticities for International Message Telephone Service," with John D. Jackson, *Applied Economics*, Vol. 36, 2004.

"Competition and Market Structure in Local Exchange and Long Distance Telecommunications Markets," with T. Randolph Beard. *International Handbook on Telecommunications Economics*, Vol. I, Ch. 6, Gary Madden ed., Edward Elgar: 2002.

"Why Adco? Why Now? An Economic Exploration into the Future of Industry Structure in Local Telecommunications Markets," with T. Randolph Beard and Lawrence Spiwak. *Federal Communications Law Journal*, Vol. 54, 2002.

"Price, Quality, and Consumer Welfare in the Cable Television Industry," with T. Randolph Beard, Robert B. Ekelund, Jr., and Richard P. Saba. *Journal of Regulatory Economics*, Vol. 20, 2001

"The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes," with Thomas W. Hazlett. *Business & Politics*, Vol. 3, 2001.

" The Measurement of Merger Delay in Regulated and Restructuring Industries," with Robert B. Ekelund Jr. and Mark Thornton. *Applied Economics Letters*, Vol. 8, 2001.

"Changing Industry Structure: The Economics of Entry and Price Competition" with Jerry B. Duvall. *Telecommunications and Space Journal*, Vol. 7, 2000.

"Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration," with Robert B. Ekelund, Jr. and Thomas Koutsky. *Journal of Law and Economics*, Vol. XLIII, 2000.

"TV Advertising, Local Markets and Merger Guidelines: An Empirical Study," with Robert B. Ekelund, Jr. and John D. Jackson. *International Journal of the Economics of Business*, Vol. 7, 2000.

"Preserving Free Television? Some Empirical Evidence on the Efficacy of Must Carry," with John D. Jackson. *Journal of Media Economics*, Vol. 13, 2000.

"Is Radio Advertising a Distinct Local Market: An Empirical Analysis," with R. B. Ekelund, Jr. and John D. Jackson. *Review of Industrial Organization*, Vol. 14, 1999.

"On the Interpretation of Policy Effects from the Estimates of Simultaneous Systems of Equations," with John D. Jackson. *Applied Economics*, Vol. 30, 1998.

"Information Costs and Nirvana Revisited: Edwin Chadwick on Nineteenth Century Urban Funeral Markets," with Robert B. Ekelund, Jr. *Journal of Regulatory Economics,* Vol. 12, 1997. Reprinted in the *The Foundations Of Regulatory Economics*, Ed. R. B. Ekelund, Jr., Edward Elgar Publishing.

"Horizontal Concentration and Vertical Integration in the Cable Television Industry" with John D. Jackson. *Review of Industrial Organization*, Vol. 12, 1997.

CURRENT RESEARCH PROJECTS FOR PUBLICATION (Partial List):

"An Economic Analysis of Late Fees," with T. R. Beard.

"An Investigation into the Influence of Retail Gas Prices on Oil Company Profits."

"An Analysis of RESET for Conditional Mean Models," with J. Jackson.

"Selecting Members for Panel Unit Root Tests," with J. Jackson.

"The Pricing of Pole Attachments," with T. Koutsky and L. Spiwak.

"Consumers and Wireless Carterfone: An Economic Perspective," with T. Koutsky and L. Spiwak.

EXAMPLES OF LITIGATION, REGULATORY DOCUMENTS and TESTIMONY:

Developing a "National Broadband Strategy" - Understanding the OECD Rankings and the Drivers of Broadband Adoption. Presentation at the U.S. Congress Rayburn House Office Building (July 28, 2008).

Testimony Before the Federal Communications Commission's Open Meeting on Network Neutrality and Broadband Network Management, Stanford University (April 17, 2008).

Testimony Before the House Committee on Commerce and Energy - Subcommittee on Telecommunications and the Internet Hearing on "Digital Future of the United States: Part IV: Broadband Lessons from Abroad" (April 24, 2007).

Testimony Before the House Committee on Commerce and Energy - Subcommittee on Telecommunications: A Discussion Draft Addressing Broadband Mapping and Data Collection (May 17, 2007).

Capitol Hill Inter-Active Workshop: Sound Internet Policy for the 21st Century: Understanding the Economic Fundamentals (Feb. 2007).

Broadband Connectivity Competition Policy, Federal Trade Commission (Feb. 2007).

3rd Annual State of the Net Conference 2007, Advisory Committee to the Congressional Internet Caucus (Jan. 2007).

Carter Estate v. CSXT, Louisville, Kentucky (2006).

Ken Hecht v. Comcast of Indiana, Inc., et al, Indianapolis, Indiana (2005/6).

"Crummy Duopoly" or Vigorous Inter-Modal Competition? The Impact of Cable Franchise Requirements on New Fiber Builds. Phoenix Center Congressional Briefing (July 21, 2005).

Florida Bill HB 1325 and SB 1322 (Municipal Broadband). Testimony before numerous Committees of the Florida House of Representatives (Spring 2005).

Z-Tel Communications, Inc. v. SBC Communications, Inc., Texarkana, Texas (2003).

"A Response to Olbeter and Robinson's 'Breaking the Backbone'," released by MCI Worldcom (August 1999).

"An Economic Analysis of the FCC's Notice of Inquiry on Flat Rate Charges in the Long Distance Industry," filed in CC Docket No. 99-249 (September 1999).

"Further Thoughts on Payphone Compensation," filed in CC Docket No. 96-128 (November 1998).

"Effective Enforcement of Non-Discriminatory Performance by Incumbent Local Exchange Carriers," with John D. Jackson (filed with New York Public Service Commission, October 1999).

"A Review of the Texas Performance Plan," with John D. Jackson filed with the Federal Communications Commission (2000).

Investigation into Pricing of Unbundled Network Elements, Testimony filed before the State of Florida Public Service Commission, Docket No. 990649-TP (2000).

Investigation into Pricing of Unbundled Network Elements, Testimony filed before the State of Florida Public Service Commission, Docket No. 990649-TP (2000).

Investigation into Pricing of Unbundled Network Elements, Testimony filed before the State of New York Public Service Commission, Docket No. 98-C-1357 (2000).

In the Matter of US West Communications, Inc.'s Compliance with Sec 271 of the Telecommunications Act of 1996, Statement before the Arizona Corporation Commission, Docket No. T-00000B-97-0238 (2000).

Performance Measurements for Telecommunications Interconnection, Unbundling and Resale, Testimony before the Georgia Public Service Commission, Docket No. 7892-U (2000).

Investigation and Generic Proceeding on Ameritech Indiana's rates for Interconnection, Service, Unbundled Elements, and Transport and Termination, Declaration and Reply before the Indiana Public Service Commission, Cause No. 40611 (2000 2000).

Inquiry by the Department of Telecommunications and Energy Pursuant to Section 271 of the Telecommunications Act of 1996, Comments filed before the Massachusetts Department of Telecommunications and Energy, Docket No. DTE 99-271 (2000).

Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(C) of the Telecommunications Act of 1996, Multiple filings before the Indiana Utility Regulatory Commission (2000).

In the Matter of US West Communications, Inc.'s, Compliance with §271 of the Telecommunications Act of 1996, Comments and studies filed before the Arizona Corporation Commission (2000).

In the Matter of Investigation into US West Communications, Inc.'s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No.T-00000A-00-0194 (2001).

In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes, Cause No. 40611-S1 (2001).

In the Matter of the Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 For a Three Phase Process For Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of The Telecommunications Act of 1996, Cause No. 41657 (2001).

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Federal Communications Commission, CC Docket No. 99-295 (1999).

Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Federal Communications Commission, CC Docket No. 00-65 (2000)

Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Federal Communications Commission, CC Docket No. 00-217 (2000/2001).

Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri, Federal Communications Commission, CC Docket No. 01-194 (2001).

Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana, Federal Communications Commission, CC Docket No. 02-35 (2002).

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Federal Communications Commission, CC Docket No. 01-338 (2003).

BOOK REVIEWS, EDITORIALS, REPORTS, and POLICY PAPERS:

"Be Careful What You Ask For: A Comment on the OECD's Mobile Price Metrics," PHOENIX CENTER PERSPECTIVES No. 09-03 (September 16, 2009).

"The Broadband Adoption Index: Improving Measurements and Comparisons of Broadband Deployment and Adoption," PHOENIX CENTER POLICY PAPER No. 36 (July 2009).

" The Need for Better Analysis of High Capacity Services," PHOENIX CENTER POLICY PAPER No. 35 (June 2009).

"Econometric Analysis of Broadband Subscriptions: A Note on Specification," PHOENIX CENTER PERSPECTIVES No. 09-02 (May 12, 2009).

"Normalizing Broadband Connections," PHOENIX CENTER PERSPECTIVES No. 09-01 (May 12, 2009).

"The Pricing of Pole Attachments: Implications and Recommendations," PHOENIX CENTER POLICY PAPER No. 34 (December 2008).

"Do High Call Termination Rates Deter Broadband Deployment?," PHOENIX CENTER POLICY BULLETIN No. 22 (October 2008).

"Broadband Expectations and the Convergence of Ranks," PHOENIX CENTER PERSPECTIVES No. 08-03 (October 1, 2008).

"Consumers and Wireless Carterfone: An Economic Perspective," PHOENIX CENTER POLICY BULLETIN No. 21 (September 2008).

"Valuing the AWS-3 Spectrum: A Response to Comments," PHOENIX CENTER POLICY PERSPECTIVE No. 08-02 (July 2008).

"Calculating the Value of Unencumbered AWS-III Spectrum," PHOENIX CENTER POLICY PERSPECTIVE No. 08-01 (June 2008).

"Using Auction Results to Forecast the Impact of Wireless Carterfone Regulation on Wireless Networks," PHOENIX CENTER POLICY BULLETIN No. 20 (May 2008).

"The Broadband Efficiency Index: What Really Drives Broadband Adoption Across the OECD?," PHOENIX CENTER POLICY PAPER No. 33 (May 2008).

"The Welfare Impacts of Broadband Network Management: Can Broadband Service Providers Be Trusted?," PHOENIX CENTER POLICY PAPER No. 32 (March 2008).

"A Valley of Death in the Innovation Sequence: An Economic Investigation," Phoenix Center Study for the United States Department of Commerce (2007).

"The Demographic and Economic Drivers of Broadband Adoption in the United States," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 31 (November 2007).

"An Economic Approach to Evaluating a National Wireless Regulatory Framework," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY BULLETIN No. 19 (October 2007).

"Quantifying the Cost of Substandard Patents: Some Preliminary Evidence," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 30 (September 2007).

"The Broadband Performance Index: A Policy-Relevant Method of Comparing Broadband Adoption Among Countries," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 29 (July 2007).

"Wireless Net Neutrality: From Carterfone to Cable Boxes," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY BULLETIN No. 17 (April 2007).

"University of Florida Study Shows Only Winners from Network Neutrality Regulation to be Content Providers, Consumers Lose." PHOENIX CENTER POLICY PERSPECTIVE No. 07-01 (March 2007).

"Network Neutrality and Foreclosing Market Exchange: A Transaction Cost Analysis," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 28 (March 2007).

"Tort Liability for Software Developers: A Law & Economics Perspective," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 27 (January 2007).

"An Investigation into the Influence of Retail Gas Prices on Oil Company Profits," PHOENIX CENTER POLICY PAPER No. 26 (August 2006).

"The Burden of Network Neutrality Mandates on Rural Broadband Deployment," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 25 (July 2006).

"The Efficiency Risk of Network Neutrality Rules," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY BULLETIN No. 16 (May 2006).

"Network Neutrality and Industry Structure," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 24 (April 2006).

"Unnecessary Regulations and the Value of Spectrum: An Economic Evaluation of Lease Term Limits for the Educational Broadband Service," with Thomas M. Koutsky, PHOENIX CENTER POLICY BULLETIN No. 15 (February 2006).

"A La Carte and 'Family Tiers' as a Response to a Market Defect in the Multichannel Video Programming Market," with Thomas M. Koutsky, PHOENIX CENTER POLICY BULLETIN No. 14 (February 2006).

"In Delay There Is No Plenty: The Consumer Welfare Cost of Franchise Reform Delay," with Thomas M. Koutsky, PHOENIX CENTER POLICY BULLETIN No. 13 (January 2006).

"Franchise Fee Revenues After Video Competition: The 'Competition Dividend' for Local Governments," with Thomas M. Koutsky, PHOENIX CENTER POLICY BULLETIN No. 12 (November 2005).

"Higher Prices Expected from the Cingular/AT&T Wireless Merger," PHOENIX CENTER POLICY BULLETIN No. 11 (26 May 2004).

"The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 23 (September 2005).

"The Consumer Welfare Cost of Cable "Build-out" Rules," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 22 (July 2005).

"Competition After Unbundling: Entry, Industry Structure and Convergence," with Thomas M. Koutsky and Lawrence J. Spiwak, PHOENIX CENTER POLICY PAPER No. 21 (July 2005).

"Quantity-Discount Contracts as a Barrier to Entry," with T. Randolph Beard and Lawrence J. Spiwak/ PHOENIX CENTER POLICY PAPER NO. 20 (November 2004).

"The Positive Effects of Unbundling on Broadband Deployment," with Lawrence W. Spiwak. PHOENIX CENTER POLICY PAPER NO. 19 (September 2004).

"Set It and Forget It? The Consequences of Market Power and Deregulation in Telecommunications Markets Services," with L. J. Spiwak. PHOENIX CENTER POLICY PAPER No. 18 (June 2003).

"What Determines Wholesale Prices for Network Elements in Telephony? An Econometric Evaluation," with T. Randolph Beard, PHOENIX CENTER POLICY PAPER NO. 16 (September 2002).

"Make or Buy? Unbundled Elements as Substitutes for Competitive Facilities in the Local Exchange Network," with Thomas R. Beard. PHOENIX CENTER POLICY PAPER NO. 14 (September 2002).

"Why Adco? Why Now? An Economic Exploration into the Future of Industry Structure in Local Telecommunications Markets," PHOENIX CENTER POLICY PAPER No. 12 (November, 2001).

"An Economic Analysis of the FCC's Notice of Inquiry on Flat Rate Charges in the Long Distance Industry," PHOENIX CENTER POLICY PAPER No. 11 (May, 2001).

"Changing Industry Structure: The Economics of Entry and Price Competition" with Jerry B. Duvall, PHOENIX CENTER POLICY PAPER No. 10 (April 2001) and *Telecommunications and Space Law, 2001*.

"Flow Through and Competition in the International Message Telephone Service Market," PHOENIX CENTER POLICY PAPER No. 7 (September, 2000).

"Higher Prices Expected from the Cingular/AT&T Wireless Merger," PHOENIX CENTER POLICY BULLETIN NO. 11 (26 May 2004): with Lawrence W. Spiwak.

"Fixed-Mobile "Intermodal" Competition in Telecommunications: Fact or Fiction? "PHOENIX CENTER POLICY BULLETIN NO. 10 (30 March 2004): with Lawrence W. Spiwak.

"Federalism in Telecommunications Regulation: Effectiveness and Accuracy of State Commission Implementation of TELRIC in Local Telecoms Markets," PHOENIX CENTER POLICY BULLETIN NO. 9 (9 March 2004): with Lawrence W. Spiwak.

"The $10 Billion Benefit of Unbundling: Consumer Surplus Gains from Competitive Pricing Innovations," PHOENIX CENTER POLICY BULLETIN NO. 8 (27 January 2004): with Lawrence W. Spiwak and Thomas Koutsky.

"The Positive Effects of Competition on Employment in the Telecommunications Industry," PHOENIX CENTER POLICY BULLETIN NO. 7 (15 October 2003): with Lawrence W. Spiwak.

"UNE-P Drives Bell Investment - A Synthesis Model," PHOENIX CENTER POLICY BULLETIN NO. 6 (17 September 2003): with Lawrence W. Spiwak.

"Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P," PHOENIX CENTER POLICY BULLETIN NO. 5 (Originally released 9 July 2003 and updated 17 September 2003): with Lawrence W. Spiwak.

"The Truth About Telecommunications Investment after the Telecommunications Act of 1996," PHOENIX CENTER POLICY BULLETIN NO. 4 (24 June 2003) : with Lawrence W. Spiwak.

"Telecommunications Stocks and the FCC's Triennial Review," PHOENIX CENTER POLICY BULLETIN NO. 2 (11 March 2003).

"In Through the Back Door: Embedded Cost and the FLC." June 2002. (www.aestudies.com).

"How Many Days in a Year? Creative Cost Modeling and the Cost to Competition." June 2002. (www.aestudies.com).

"A Fox in the Hen House: An Evaluation of Bell Company Proposals to Eliminate Their Monopoly Positions in Local Telecommunications." June 2002. (www.aestudies.com).

"Opportunities for Local Exchange Competition Are Greatly Exaggerated." *Electric Light & Power*, April 1998.

Welfare Economics and Externalities in an Open Ended Universe: A Modern Austrian Perspective, by Roy E. Cordato. *Southern Economic Journal* (April, 1994).

Toward Competition in Local Telephony, by William J. Baumol and Gregory Sidak. *Southern Economic Journal* (April, 1996).

"Competition Will Decrease Cable Rates: On Curbing Cable Costs," with Audrey B. Davidson. *Business First*, September 6, 1993.

"TKR Cable Not Living Up To Promises To Cut Rates," with Audrey B. Davidson. *The Louisville Cardinal*, September 2, 1993.

"The Cable Television Industry: An Annotated Bibliography" Published and Funded by the *Auburn Utilities Research Center,* Summer 1994.

Proof of Delivery

I hereby certify that on Monday, June 06, 2022, I provided a true and correct copy of the SoundExchange's Reply Brief Concerning the Meaning of 37 CFR § 384.3(a) to the following:

Pandora Media, Inc., represented by Milton E. Olin, Jr., served via Email

Muzak LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Music Reports, Inc., represented by William Colitre, served via Email

Music Choice, represented by Jacob B Ebin, served via E-Service at jebin@mayerbrown.com

DMX, Inc., represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Clear Channel Communications, Inc., represented by Bruce Joseph, served via Email

Sirius XM Radio, Inc., represented by Todd Larson, served via Email

Signed: /s/ Steven R. Englund